

ROUGH LECTURE NOTES

Remedies – U of H Law Center (Brent E. Newton)

Caveat: Although I am willing to distribute my lecture notes to students as a study aid, you should not rely on these notes in lieu of reading the casebook, Re & Re, *Remedies* (2005 6th ed.). These notes are truly “rough.” They were not written with the intent of distributing them to students as a study aid. Thus, for exam purposes, if there are any inconsistencies (real or perceived) between these notes and the Casebook, the Casebook controls.

In addition, these lecture notes were prepared based on the *fifth* edition (2000) of the casebook. The *sixth* edition (2005) differs in certain respects (omits some cases and adds some new cases). The lecture notes also were prepared when I taught this court as a three-hour – rather than a two-hour – course. Thus, they cover all the cases in the book, while my two-hour course only covers some (albeit a majority) of the cases.

Abbreviations used in these notes: “P” and “D” for plaintiff and defendant. “S-O-L” for statute of limitations. “S-O-F” for statute of frauds. “P & S” for “pain and suffering.”

CLASS NOTES #1 & #2

Ubi jus, ubi remedium – always true? Example of *Bush v. Gore*

History of Equity: roots in Roman law, church law, and – most importantly – English law beginning in the 1400s

* The King of England's "Chancellor" – eventually developed into a "court of record"

Merger of actions "at law" and "in equity" – NY (1840s) & Fed. R. Civ. P. (1930s)

Proliferation of modern statutes supplanting/modifying common-law equitable remedies

Equity is "DISCRETIONARY" -- even if caselaw supports your theory of relief, a judge still must consider the totality of the facts/circumstances and exercise "sound discretion" in deciding to grant or deny the requested equitable relief -- **NOTE HERE:** on appeal, an appellate court applying an "abuse of discretion" standard of review could be faced with two identical cases, one in which one judge granted the requested equitable relief, the other in which another judge denied it; so long as each judge properly considered the applicable rules of equity, an appellate court is likely to affirm both cases

Affirmative vs. Defensive Use of Equity -- sword vs. shield

Ex. of affirmative use -- a plaintiff sues for specific performance

Ex. of defensive use -- a plaintiff sues for money damages for alleged breach of contract and the defendant counters by contending that, because of inequitable conduct on part of plaintiff, the court should rescind or reform the contract

*courts are more willing to grant equitable relief when in the "defensive" posture -- less inequitable conduct required for relief to be granted in this situation

Riggs v. Palmer (NY 1889) -- case of the grandson who murdered his grandfather in order to receive inheritance -- there was evidence that, at the time of the murder, the grandfather was threatening to revoke the will naming the grandson as the primary beneficiary -- Court refused to apply probate statute according to its terms (which would have given the inheritance to the grandson, because of his "unclean" hands -- indeed, his bloody hands)

Dissent: took the position that a court must apply a statute as written, without consideration of any extra-statutory equitable principles

* Case also stands for the proposition that, inequitable conduct on part of a party can result in "absurd" consequences if an applicable statute is applied as written ("absurdity" exception to the "plain language" doctrine of statutory construction)

Graf v. Hope Building Corp. (NY 1930)

Case of the draconian mortgage acceleration clause -- mortgagor's arguably "innocent" mistake ("mere negligence") in failing to make a complete mortgage payment within the 20-day grace period -- mortgagee fully aware of mortgagor's mistake but sat silently -- waited until day 21 and then pounced. Court, in a 4-3 decision, held that, too bad, contract must be enforced, no "unconscionable" or "inequitable" conduct

***Cardozo's famous dissenting opinion** -- considered small amount in default, "innocent" mistake, fact that mortgagee knowingly exploited mortgagor's mistake -- would be "unconscionable" to enforce acceleration clause under totality of the circumstances

SPECTRUM OF INEQUITABLE CONDUCT -- Riggs v. Palmer at one end (virtually everyone agrees it was the right result) <-----> Graf -- much closer case

[Texas cases on Mortgage Acceleration Clauses -- Crestview, Ltd v. Foremost Ins. Co., 621 S.W.2d 816 (Tex. Civ. App. 1982) -- generally enforceable, even if draconian results, absent inequitable conduct on part of mortgagee]

Weinberger v. Romero-Barcelo (US Sp Ct. 1982): Puerto Rican nationalist sued to enjoin Navy from practice bombing in Puerto Rican waters, relying on the Clean Water Act; trial court found that, although Navy failed to obtain a permit from the EPA to drop bombs in the ocean, the bombs did not cause any water pollution. Trial court denied injunction. Court of Appeals held that injunction required under Clean Water Act. USSC held that an injunction was improper since no "irreparable harm" shown, notwithstanding violation of Act. Contrast TVA v. Hill (snail-darter case, in which Court found that Congress clearly intended to supplant common law equitable requirements for an injunction).

Romero-Barcelo stands for proposition that, unless the legislature "clearly" intends to supplant traditional common law equitable remedies with statutory remedy, courts will still require traditional common law requirements. "Irreparable harm" is a basic requirement for an injunction (along with "inadequate remedy at law").

*** EQUITABLE MAXIMS [pages 30-31 of Casebook]

J.R. v. M.P. (English 1459) -- classic *in personam* equitable jurisdiction case -- M.P. & J.B. assumed debts owed to J.R.; however, the way in which they were conveyed prevented M.P. & J.B. from recovering from the original debtors unless J.R. conveyed the sealed instruments to them, which he refused; in other words, they became indebted to J.R. but they had no ability to collect the debts from the original debtor -- at that time (1400s), no common law remedy available to them (despite lack of consideration), so they go to Chancellor on a "writ"; J.R. ordered "in equity" to either release them from debts or give them sealed instruments, so that they could collect debts; he refused and was sent to prison [contempt]. J.R. (now as P) then sued Ds on the notes to collect. Ds "demur," contending that, based on the Chancellor's equitable decree, J.R.'s legal action was barred (**res judicata** of sorts). Court of Common Pleas,

by a divided vote, appeared to hold that decree of chancery was only *in personam* and not *in rem* -- thus, the decree did not cancel the legal effect of the Ds' obligation to P and the Ds could not assert the decree as a bar in the legal action.

Note: HERE THERE IS A "RIGHT," BUT THE "REMEDY" IS FRUSTRATED SINCE J.R. CHOSE TO STAY IN JAIL RATHER THAN LET THE Ds OUT OF THEIR OBLIGATION [inherent limit to traditional equitable remedies]

* traditionally, courts of equity cannot vacate prior judgments of legal courts -- rather, equity courts can only order parties to do something on the threat of holding them in contempt (and fining them or sending them to prison)

WHAT WOULD HAVE BEEN A BETTER EQUITABLE REMEDY IN J.R.? make him pay a restitution to Ds and, if he refused, have a third party serve as a receiver of a constructive trust or issue a "WRIT OF SEQUESTRATION" (which is the closest thing to *in rem* equity jurisdiction), assuming that such modern remedial devices then existed in 1400s

Excerpt from Langdell's 1883 Equity Treatise [pages 35-38 in the Casebook] talks about traditional equity court's greatest "strength" was also its greatest "weakness" -- i.e., an equity court's **power to compel litigants through contempt power** (largely lacking in traditional courts of law).

MERGER OF LAW & EQUITY -- historically, two different courts or two different "sides" of the same court (two different dockets) -- from mid-1800s to 1930s, most jurisdictions, including federal court, "merged" law and equity into the same trial courts

Traditional nomenclature: "Bills" filed "in equity"; "complaints" or "petitions" filed in legal actions; "decree" in equity case vs. "judgment" in action at law

* Casebook, at page 42 -- breakdown, as of year 2000, of the three types of approaches to merger (or non-merger) in American jurisdictions

* Generally speaking, in a merged system, if law and equity conflict, equity prevails

* EQUITABLE RELIEF REFERRED TO AS "SPECIFIC RELIEF"; LEGAL REMEDIES ARE REFERRED TO GENERALLY AS "SUBSTITUTIONAL RELIEF"

"EQUITABLE JURISDICTION":

* the term equity or equitable "**jurisdiction**" is a misnomer -- doesn't really refer to subject-matter "jurisdiction" -- really a "**prudential**" matter of whether court should exercise equitable powers

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc. (US Sp. Ct. 1999) (Note,

Casebook, at page 42) -- plaintiff sued defendant on an acceleration clause in an unsecured loan agreement -- because defendant was on verge of insolvency and appeared to be favoring inferior creditors in Mexico to plaintiff, plaintiff moved for a preliminary injunction to restrain defendant from transferring any more assets -- defendant's insolvency would frustrate plaintiff's ability to collect a potential money judgment. Lower federal courts granted injunction -- USSpCt reversed in a 5-4 decision.

Ct's holding: NO EQUITY "JURISDICTION" -- Scalia, for the majority, looked to the state of the law in 1789, at the time that the Constitution and Judiciary Act of 1789 went into effect. At that time, a legal judgment fixing a debt was required before a court of equity would interfere with the debtor's use of its property. Thus, majority refuses to permit such a federal court equitable remedy in 1999.

* Note: majority's holding only applicable to federal court's general equitable jurisdiction; not applicable to state court's interpretation of state law or a federal diversity court's interpretation of applicable state law

DISSENT (Ginsburg et al): undisputed contractual violation by D and also undisputed that D was favoring its unsecured Mexican creditors over P -- Dissent favors a more evolutionary interpretation of federal court's equity powers than the "static" interpretation of majority

[SIMILAR DEBATE IN OTHER LEGAL CONTEXTS – e.g., meaning of 8th Amendment's "Cruel and Unusual Punishments" Clause – Scalia's "original intent" school of thought]

Question of Erie's effect on remedies in federal diversity action – Interestingly, raised by one of the parties in Grupo Mexicano (which was a federal diversity case) but Supreme Court did not address because it was raised for the first time in Supreme Court

Complex issue – excellent law review article: **Prof. John Cross, *The Erie Doctrine in Equity*, 60 La. L. Rev. 173 (1999)** – pre and post Erie Supreme Court cases discussing this issue —> pre-Erie, federal courts in diversity and non-diversity cases generally applied "federal" remedial law, legal or equitable, with some deference to state laws; post-Erie, legal remedies generally viewed as "substantive" (rather than "procedural") law under Erie; somewhat unclear re: equitable remedies ("**right/remedy merger**") – Guaranty Trust Co v. York's dicta about the "**equity exception**" to Erie where state law does not entirely cut off remedy (S-O-L, no equitable exceptions thereto under state law in York) – lower federal courts split, see Bogosian v. Wolooohojian Realty Corp., 923 F.2d 898, 904 (1st Cir. 1991) – Supreme Court ducked the issue in footnote # 3 in Grupo Mexicano

Strank v. Mercy Hospital of Johnstown (Pa. 1955) -- plaintiff, expelled third-year nursing school student, sued teaching hospital to give her credit for her completed courses and release her grades to another nursing school. Defendant moved to dismiss for lack of equity jurisdiction. Court held that "equity jurisdiction" existed here. Plaintiff had no adequate remedy at law and is

irreparably injured.

QUESTION: why did the plaintiff not have an adequate remedy at law (money damages would not compensate her adequately -- how do you measure damages here -- too speculative)

TWO PRIMARY “ELEMENTS” TO MOST EQUITY ACTIONS (in particular, injunctions): (1) inadequate remedy at law; and (2) “irreparable” harm

RES JUDICATA BETWEEN LAW AND EQUITY ACTIONS:

Res judicata also referred to as “issue preclusion” and “collateral estoppel” – basic elements: (1) same parties; (2) same issue; (3) court of competent jurisdiction issued ruling in prior case (4) judgment or decree not reversed on appeal and not otherwise collaterally attacked

Mutual Life Ins. Co. v. Newton (NY 1888) -- *res judicata* bar to subsequent legal action following equitable action

QUESTION: What about the J.R. case, supra? Why no *res judicata* there? [probably because, at that early juncture in history of equity courts, chancery’s decree not considered a decree of a “court of record” -- see Casebook, at p. 34]

Williamsburgh Savings Bank v. Solon (NY 1893) [Note 1, pages 49-50 of the Casebook] -- town sued in equity bondholder of municipal bond for rescission -- i.e., to cancel bond for non-compliance with statute. Town lost rescission action. Then, in a subsequent legal action, bondholder turned around and sued town for unpaid interest coupons on the bonds. Town defended on ground that bonds were invalid. Court held that prior equitable action was *res judicata* of town’s defense in legal case.

RIGHT TO A JURY TRIAL:

* Under 7th Amendment to U.S. Const., generally speaking, right to a jury trial in “legal” actions; no right to a jury trial in “equity” cases

* 7th Amendment not applicable to States; as a general matter, states are free to broaden or restrict right to jury trial [Texas provides for a much broader right to a jury trial, including in many equity cases, at least with respect to factual issues in equity cases]

Chauffeurs, Teamsters & Helpers Union, Local No. 391 v. Terry (US Sp Ct 1990) 4-1-1-3 vote -- splintered court -- Union members sued Union for breach of duty of fair representation -- plaintiff asked for jury trial, which district court denied -- Sp. Ct. holds that plaintiffs had a right to a jury trial.

Justice Marshall’s plurality opinion -- two-pronged test to determine whether right to jury trial exists under 7th Amendment: (1) nature of issues [comparison to 18th Century English actions --

comparable or analogous actions] and (2) type of remedy sought. Second inquiry more important. The action in instant case is somewhat analogous to an old equitable suit for a breach of fiduciary duty by a trust beneficiary against a trustee, but also analogous to a breach of contract action (legal). However, the REMEDY SOUGHT -- compensatory money damages -- is more akin to traditional damages in an action at law. Thus, right to jury trial in this case.

* Brennan & Stevens's concurrences -- reject historical analogy test -- not for courts [more of a historian's job] -- should only focus on nature of remedy (legal or equitable)

* DISSENT (three Justices) -- test should look primarily at historical analogues -- nature of remedy less important; should not be a separate, more important factor

Fed. R. Civ. P. 38 -- timely demand for jury trial by party required; otherwise, waived

Fed. R. Civ. P. 39 -- "advisory" jury in equitable actions -- truly "advisory" (judge can order *sua sponte*) vs. binding effect (only with parties' consent)

* Important Supreme Court cases in Notes 2-8, Casebook, pages 66-68:

Beacon Theatres, Inc. v. Westover (US Sp Ct 1959) -- Defendant's legal cross claim is entitled to a jury trial even if Plaintiff filed an equitable action

Dairy Queen, Inc. v. Wood (US Sp Ct 1962)-- defendant entitled to jury trial where plaintiff raises legal claims as part of larger equitable action -- courts must parse distinct claims for relief in determining right to jury trial

* Note: Beacon Theatres & Dairy Queen severely restricted former federal court "clean-up doctrine" in federal cases with both equitable and legal claims

Parklane Hoisery Co. v. Shore (US Sp Ct 1979) --applying res judicata bar (based on decree in a prior equity case involving same parties/issues) will not violate 7th Amendment in subsequent legal case where right to jury trial would otherwise have existed had the action first been brought as an action "at law"

Lytle v. Household Manuf. Inc. (US Sp Ct 1990) -- When both legal and equitable claims are filed in same action, a SEVERANCE should occur and legal claims should be tried first with a jury (e.g., Title VII & sec. 1983 claims in same case; sec. 1983 claim first (with a right to a jury trial) and Title VII claim next (with no right to a jury trial))

* Right to a Jury Trial in **Administrative Proceedings?** Generally, no right to a jury trial in administrative (as opposed to judicial) proceedings -- see Curtis v. Loether (US Sp. Ct. 1974). However, if a truly "private" (as opposed to "public" right) at issue, then parties may have a right to a jury trial in a case that Congress has committed to an agency's jurisdiction -- see Atlas Roofing Co. v. OSHRC (US Sp. Ct. 1977)

* Right to a Jury Trial in **Bankruptcy Proceedings** (which are deemed equitable in nature for most purposes)? Generally not. See Langenkamp v. Culp (US Sp. Ct. 199). However, right to jury trial does exist when **nonparties** are brought in bankruptcy proceeding on legal claims. See Granfinanciera, S.A. v. Nordberg (US Sp. Ct. 1989).

Tull v. U.S. (US Sp. Ct. 1987) – right to jury trial exists in a case where a party seeks civil statutory penalty (in the form of \$ damages)

Feltner v. Columbia Pictures Television (US Sp Ct 1998) -- right to jury trial when statutory damages claim is created as a remedy in lieu of “actual” damages – Also, this case holds that right extends to jury’s determination of amount of damages under statutory scheme

City of Monterey v. DelMonte (US Sp Ct 1999) -- when \$ damages are sought in a civil rights action under 42 U.S.C. § 1983, Ct. – majority of Justices, i.e., plurality and Justice Scalia – held that a right to a jury trial exists in a section 1983 case whenever compensatory damages sought -- plurality looked at particular type of money damages (just compensation claim) -- Scalia said *any* \$ damages in sec. 1983 action entitle parties to jury trial.

CLASS NOTES #3

ENFORCEMENT OF EQUITABLE DECREES:

Contempt-of-Court:

Cape May & Schellinger's Landing R.R. Co. v. Johnson (NJ 1882):

[preliminary matter – order to “show cause” – standard procedure in contempt case]

Facts: defendants, city councilmen, held in criminal contempt for disobeying an injunction to refrain from passing a disputed ordinance – prior notice of injunctive given to Ds (undisputed)

First issue: sufficiency of notice (by telegram) – ct. holds sufficient notice: (1) from a “source entitled to credit” and (2) sufficiently informs party of nature of injunction and specifically warned them of contempt sanction

Second issue: defendants claimed they consulted their legal counsel, who advised that they could pass the ordinance – no excuse, the court holds

Third issue: well-established principle of injunctions that a party in disagreement with injunction can't willfully defy it; rather, must challenge the constitutionality of it on appeal

* fact that it turned out that injunction was “improvidently or erroneously made” does not serve as an excuse for the defendants' contempt by willfully violating injunction – however, that fact can serve as mitigation in assessing punishment for contempt (in this case, relatively nominal fine of \$10 and court costs)

Lord Wellesley v. Earl of Mornington (English 1848): Issue is whether an enjoined party's agent – unnamed in the injunction – is bound by the injunction (and, thus, subject to contempt) if the agent *knowingly* violates terms of injunction

Facts: Injunction to prevent defendant Earl from cutting timber; Batley (real party in interest) is agent of the defendant Earl. After having actual knowledge of injunction, Batley continues to cut wood as agent of Earl. Plaintiff moves for motion to have Batley held in contempt for willfully aiding and abetting Earl in violating injunction.

Holding: Batley, the agent, is subject to contempt as agent who willfully aided Earl, even though Batley not named in injunction

Rivas v. Livingston (NY 1904): Facts: plaintiff, fruit stand operator, sued for an injunction against certain named city officials to prohibit them from removing his stand – Store owner, Levy (non-party), had asked the city officials to get involved – Rosenblum, Levy's son-in-law

and landlord of Levy's store, then brought proceedings in municipal court to dispossess Levy from his store – Levy lost by default in that case. Therefore, city marshal and lawyer for Rosenblum removed fruit stand. Plaintiff then moved to hold city marshal, lawyer, and Levy for contempt for violating injunction. Proof was that all three knew of injunction at time fruit stand removed/destroyed. Contempt order entered – \$150 fine. Levy appealed.

[PROCEDURAL ISSUE: a party *or* the court (*sua sponte*) can initiate contempt proceeding – motion for order to “show cause” by party]

Court of Appeals held that, although it was “suspicious” that Levy and Rosenblum might have secretly concocted all of this, the uncontradicted evidence was that Levy had no agency relationship to any of the named defendants in the equity action.

* To the extent that the injunction decree purported to restrain *anyone* with knowledge of the injunction, that portion was void – there needs to be PRIVACY or AGENCY RELATIONSHIP, or sufficient proof that there was an ACT OF COLLUSION – while the Ds here were arguably guilty of trespass, they cannot be held in contempt

Note: Although Levy was the only one who appealed, the court's holding would appear to apply to city marshal and lawyer for Rosenblum as well, since they were not agents or acting in collusion with named defendants in injunction case

United Pharmacal Corp. v. U.S. (1st Cir. 1962): US got an injunction against Metabolics Products Corp. and their “agents” restraining them from introducing an allegedly misbranded drug into interstate commerce – United Pharmacal Corp. (“UPC”) (contractual relationship with Metabolics, to buy drugs from them) served with injunction. UPC not a subsidiary of Metabolics. Nor was there any proof that UPC was a “pawn” or “tool” for Metabolics. Metabolics was “minority stock holder” of UPC and had a distribution agreement with it. UPC sued for a declaratory judgment that it was not bound by injunction. While DJA case pending, UPC thereafter shipped drugs in interstate commerce after receiving notice of injunction. However, evidence showed that the drugs shipped were not supplied by Metabolics but by an “outside source.” US filed motion to for UPC to “show cause” why it should not be held in contempt. District Court held UPC in contempt. *Undisputed that Metabolics itself did not violate injunction

Holding: Ct. looks to Fed. R. Civ. P. 65(d) – couched in terms of party or agents, alter ego, etc. or those persons “in active concert or participation” with party. Since UPC was not an agent or alter ego, only issue is whether evidence was sufficient to support finding that UPC was in “active concert or participation” with Metabolics. – 1st Cir. that there was insufficient evidence to prove that. Although evidence of *past* “active concert” by two, post-injunction evidence showed that UPC acted independently – drug shipped came from an “outside source” – no privity between two with respect to UPC's shipment of drugs after notice of injunction. CONTEMPT ORDER REVERSED.

*not as if Metabolics supplied drug to UPC after injunction, knowing that UPC would in turn ship it.

* 1st Cir.'s discussion of 2d Cir. case of Alemite Mfg. (Learned Hand, J.) – if person enjoined is not in contempt, then “derivative” liability (in effect, aiding and abetting liability) cannot be imposed on non-party as an alleged agent of, or person working in collusion with, party enjoined

United States v. Hall (5th Cir. 1972) (Wisdom, J.) – issue: whether criminal contempt occurs when a non-party who has no relationship with a party violates a court order designed to “protect the judgment” in a school desegregation case.

Facts: Federal district court's deseg. order in Jacksonville, FL case. Certain African-Americans as well as whites in the community were unhappy with deseg. order. Hall was a community “activist.” Racial unrest; violence ensued. High school temporarily shut down. Dist. court entered order that enjoined parties *as well as non-parties* from engaging in acts that would disrupt school. Injunction order by its own terms applied to “anyone.” A copy was actually served on Hall. Injunction order specifically warned that violation would result in criminal contempt. Hall then willfully violated injunction – even told a U.S. Marshal that was his intent. Hall found guilty and sentenced to 60 days imprisonment.

Holding: On appeal, 5th Circuit held that “common law” rule that non-parties acting independently could not be held in contempt was not applicable to this case. Ct. also rejected argument that injunction against a non-party was foreclosed by a strict application of Rule 65(d), which by its terms is limited to parties, agents, people acting in concert with party, etc. 5th Cir. distinguished traditional equity cases (e.g., Alemite Mfg.) on the ground that the persons in those cases wrongly held in contempt did not interfere with the court's adjudication of **the defendant's duty under the judgment** – rather, they only interfered with the plaintiff's rights. In this case, Hall's actions interfered with *both* P's rights and D's duties – in effect, interfered with court's judgment. Hall's actions “imperiled the court's fundamental power to make a binding adjudication between the parties properly before it.” Similarly, Hall undercut the ability of the court to enforce judgment IN THE FUTURE. Inherent authority of a court to issue orders that “protect” its present judgment and future judgments.

*Analogous to injunctions in “in rem” cases – applies to all persons in order to protect the essence of the court's judgment (the res)

5th Cir. stated that in “public litigation”/constitutional litigation cases – like schools deseg. cases – EQUITY REQUIRES BROAD AND FLEXIBLE REMEDIAL POWERS

Ct. holds that “plain language” of Rule 65(d) does not control – rather, ct. concluded that Rule 65(d) was intended to codify the “common law” **“inherent”** authority of court [JUDICIAL ACTIVISM]

United States v. United Mine Workers (“UMW”) (US Sp Ct. 1947) (Casebook, at p. 81) --

-Breakdown of Justices' votes – 5 that statutes didn't bar injunction; 5 votes that district court nevertheless had "inherent" authority to enjoin/hold violators in contempt; 4 votes that statutes did bar injunction; 2 votes not to reach "inherent" authority issue as dicta; 2 votes in dissent re: statutes and on whether, when a court lacks jurisdiction to issue injunction, whether criminal contempt is appropriate

Facts: Famous case of Harry S Truman vs. John L. Lewis -- US Gov't took over possession and control of coal mines in 1946 as part of war-to-peace transition; subsequent labor dispute between UMW (led by John L. Lewis) and gov't (as the boss of the miners' union); Lewis sought to unilaterally terminate prior labor agreement and so informed members of the union (which the Gov't characterized as a "strike notice"). Gov't filed action for declaratory judgment and sought TRO/preliminary injunction against UMW's encouragement of a strike. Without notice, the district court issued a TRO. UMW then served with notice on November 18, 1946. By Nov. 20, full-fledged strike ensued at urging of UMW; most mines in US went idle. On November 21st, US moved for contempt order. UMW responded by contending that the district court had NO JURISDICTION to enter the injunction under the Norris-LaGuardia Act/Clayton Act. District court responded that it possessed jurisdiction under statutes. Dist. ct. then found UMW & Lewis in contempt (civil and criminal) – hefty fines imposed.

HOLDING: Ct. first holds that dist. ct. had authority under N-L and Clayton Acts to issue injunctive relief, although it was considered a very close question. Ct. next addresses, **in 5-4 dicta**, "alternative grounds which support the power of the District Court to punish violations of its orders as criminal contempt": federal courts have inherent jurisdiction to issue "status quo" injunctions – that is, courts have temporary jurisdiction to determine whether they have permanent jurisdiction and may issue injunctions to preserve status quo, at least where underlying jurisdictional issue is not "frivolous"

* Furthermore, once a court possesses jurisdiction over subject matter & parties in a case, an order issued by the court must be obeyed unless and until it is overturned on appeal or on reconsideration by issuing court – ***parties can't defy it with impunity (even if the order is later reversed on appeal) – punishable by CRIMINAL contempt even if order later reversed on appeal***

* Court is careful to note that, with respect to CIVIL contempt, if it turns out that trial court lacked jurisdiction or authority to issue injunction/order, then other party cannot collect civil contempt "damages"

* criminal contempt ("punitive") vs. civil contempt (coercive/compensatory to other party) – Civil contempt can be "PURGED"

Finally, Ct. reduces \$3.5 million fine against UMW to \$700,000 with condition that the remaining \$2,800,000 will be remitted so long as the union "purges" itself within a reasonable period of time

Concurring opinions by Frankfurter & Jackson – disagree with majority re: statutes, but agree with "inherent" authority dicta

Concurring opinions by Black & Douglass – agree with majority re: statutes; wouldn't reach "inherent" authority issue as dicta

Dissenting opinions by Rutledge & Murphy – disagree with majority re: statutes and further disagree that court has "inherent" authority to enjoin and punish willful violations of injunction by criminal contempt

Walker v. City of B'ham (US Sp Ct 1967) (Casebook, at p. 88) – Bull Connor vs. MLK, Jr.

-appeal from state courts (contrast UMW, which was an appeal from lower federal courts) – "Federalism" and "comity" doctrines apply here since appeal from state courts

Facts: B'ham city officials filed a motion for injunction in state trial court, seeking to restrain quintessential civil rights movement activity (e.g., sit-ins, parades). Without prior input of defendants, state trial court issued temporary injunction, which required a permit before such activity could legally take place. Walker and other petitioners (including MLK, Jr.) were served with injunction notice, but proceeded to engage in open defiance of injunction based on claim that an appeal in state courts of the injunction would be futile. City then moved for contempt order. At the "show cause" hearing, civil rights activists defended on ground that the injunction and a related local parade ordinance were unconstitutional (didn't attack jurisdiction of court). Trial court refused to address constitutional issues; held activists in contempt (3 days in jail and small fine). On appeal, the Alabama Supreme Court agreed with trial court, refused to reach constitutional issues – cited Supreme Court's decision in Howat v. Kansas for familiar holding that defendants had a duty to obey injunction if and until it was reversed on appeal.

US Sp Ct's Holding: While recognizing that the First Amendment issue was "substantial," majority of US Sp Ct agreed with Alabama courts. Petitioners (civil rights activists) should have raised the constitutional issues in the state court system in an appropriate manner instead of willfully defying the injunction. "It cannot be presumed that the Alabama courts would have ignored the petitioners' constitutional claims." Majority affirms criminal contempt convictions.

VIGOROUS DISSENTS: Warren, Brennan & Fortas (60's liberals): Excellent point -- "They were in essentially the same position as persons who challenge to constitutionality of a [criminal] statute by violating it, and then defend the ensuing criminal prosecution on constitutional grounds." Fact that Bull Connor "had the foresight" to include the unconstitutional parade ordinance in the injunction is only difference. Dissent discusses In re Green (1962), in which the Court had reversed contempt conviction in state injunction case where there was a good faith dispute about state court's jurisdiction (being preempted by the NLRA) – dissent: jurisdictional vs. First Amendment – distinction without a difference. Dissent distinguishes UMV and Howat v. State of Kansas as preserve-status-quo cases – here no need to preserve status quo; all that was done here was incorporating unconstitutional ordinance into terms of injunction

DISSENT II (Douglas and three other liberals): "The right to defy an unconstitutional statute is basic in our scheme." A facially unconstitutional statute on First Amendment grounds "need not be honored." IN EFFECT, A FORM OF PRIOR RESTRAINT – judicial "insulation" against First

Amendment challenge to unconstitutional restraint.

DISSENT III (Brennan and three other liberals): contends that the Supremacy Clause requires state enforcement of injunction by means of criminal contempt remedy must yield to superior First Amendment interests

IRONIC POST-SCRIPT: Shuttlesworth v. B'ham (1969) – USSC reverses criminal convictions of same petitioners for violations of the parade ordinance on First Amendment grounds – specifically stated that “a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.” —> here only referring to criminal sanctions imposed based on violation of underlying statute, not criminal contempt sanctions based on violating injunction that incorporated same statute

Willy v. Coastal Corp. (US Sp Ct 1992) (Note 3, Casebook, at pp. 98-99) – Rule 11 sanctions may be imposed for sanctionable conduct (e.g., frivolous filings), even if it turns out on appeal that the trial court lacked jurisdiction over the case

Anonymous (English 1631) – “condemned” prisoner threw “brickbat” at hanging judge; criminal contempt punishment in the form of torture (right hand cut off); then hanged for underlying crime

UMW v. Bagwell (US Sp Ct 1994) (Casebook, at p. 100) – issue is difference between criminal contempt and civil contempt in the context of FINES

Facts: trial court issued injunction against UMW and later found union in contempt for violations of injunction. \$64 million in fines; \$12 million ordered payable to company against which the union injured; trial court then order remainder (\$52 million) to be paid to state and county gov't based on perceived burdens on local law enforcement. Union and company settled (and court agreed to vacate \$12 million fine), but refused to vacate the “public” contempt fine. Va. Supreme Court affirmed trial court and rejected union's argument that \$52 million fine was punitive and, thus, required criminal procedure protections accorded to criminal contempt case.

US Sp Ct held that, in the context of contempt penalties involving **fines**, key question is the fine “compensatory”/”coercive” (civil) or “punitive” (criminal) in nature? Ct. held that \$52 million fine here was not “compensatory” or “coercive”; even though theoretically it was supposed to “reimburse” law enforcement costs, the amount of fine was not in any way calibrated to actual costs. More “punitive” in nature. Because it was “criminal” contempt and “serious” penalty, criminal procedural protections were required, including right to a “criminal jury trial” and all concomitant procedural protections (proof beyond a reasonable doubt).

OTHER POINTS IN COURT'S OPINION:

* contempt power is a sort of “fusion” between legis., executive, and judicial powers; thus, subject to abuse because no “separation of powers”/”checks and balances” -- need for careful judicial review here

* In context of **incarceration penalty**, the issue is whether it is “retrospective” (retributive punishment for past acts) or prospective (to compel *future* conduct, with opportunity to “purge,” where contemnor possesses the “keys to the jailhouse door”)

*Ct. notes that “serious” criminal contempt cases – involving penalties of more than 6 months incarceration – require right to jury trial and proof beyond a reasonable doubt. “Civil” contempt only requires notice and opportunity to be heard (basic elements of due process) by judge.

* Basic distinction is determined by “character and purpose” of penalty – **from an objective, not subjective, point of view** – is purpose punitive or coercive/compensatory?

* **Direct** Contempt (contempt committed in court’s presence) vs. **Indirect** Contempt (outside court’s presence, or involving some facts outside court’s presence). Difference in procedures → summary adjudication for most direct criminal contempt cases vs. separate proceeding for indirect contempt, although “serious” penalties in a direct contempt case require jury trial, etc.

Bloom v. Illinois (US Sp. Ct. 1968) (Note 2, Casebook, at p. 108) – right to jury trial in criminal contempt cases (where no statutory range of punishment) depends on actual sentence imposed (more than 6 months of incarceration entitles contemnor to jury trial) – “Serious” vs. “Petty” – in ordinary criminal cases, cts look to statutory range – if potential punishment is over 6 months, then automatic right to jury trial, even if actual punishment was less than 6 months

Young case (US Sp Ct 1987) (Note 3, Casebook, at 108) – at least in federal cases (supervisory authority case), lawyer representing a party in civil case can’t serve as prosecutor of opposing party in criminal contempt action arising out of conduct in civil case (conflict of interest)

Mayberry case (US Sp Ct 1971) (Note 4, Casebook, at p. 108-09) – where defendant’s contemptuous conduct directed at judge himself (**personal attacks**) is basis for contempt charge, due process requires different judge to preside over case (conflict of interest)

Spallone case (US Sp Ct 1990) (Note 5, Casebook, at p. 109) – district court held individual city council members – **non-parties in the case** -- in contempt for failing to vote for an ordinance implementing a racial desegregation consent decree ordered earlier by the court. US Sp Ct vacated contempt orders, reasoning that such an “extraordinary” remedy was inappropriate unless and until contempt sanctions against the city itself first failed (less drastic means doctrine)

* Spallone stands for well-established principle that a court exercising equitable powers must use the LEAST POSSIBLE POWER ADEQUATE TO ACHIEVE THE END SOUGHT

In re Yengo (NJ 1980) – issue is line between direct vs. indirect contempt

Facts: Yengo was attorney who represented criminal defendant in a lengthy, multi-defendant trial. Trial court told all attorneys at the outset that their attendance at trial was the “highest priority” and warned that sanctions would be imposed for tardy or absent attorneys. Without consulting with judge, Yengo went to Bermuda in the middle of trial and sent another attorney in his place (whom

Yengo had contacted late the night before). There was conflicting evidence about whether Yengo went for business or pleasure or both. Trial court found him in contempt and fined him \$500 after a summary adjudication. Trial court, that is, treated it as “direct” contempt with little procedural protections.

Holding: Generally speaking, direct contempt occurs in “presence” of court, while indirect contempt occurs outside presence of court or involves witnesses other than trial court. Court considers Yengo’s actions to be “direct” contempt, however, because it involved (1) an initial, unexplained absence of attorney in middle of trial and (2) a “frivolous” explanation to the court once the attorney returned. Trial court’s penalty affirmed.

* court recognized that a “majority” of other courts have viewed unjustified absences of attorneys to be “indirect” contempt

Pounders v. Waston (US Sp. Ct. 1997) (per curiam) – federal habeas corpus appeal by criminal defense attorney, Watson, who had been found in contempt in a summary adjudication in state court in California murder trial. Repeatedly, trial court had warned lawyers not to raise issue of what punishment would be imposed upon conviction. Watson did it twice and gave somewhat bogus explanations for doing it after other attorneys had been warned not to do so. Trial court found her actions were “willful” and that they “prejudiced” prosecution at trial; court found her in contempt in a summary proceeding and gave her a 2-day jail sentence. Holding: trial court acted properly; no due process violation. Attorney committed willful action that prejudiced administration of justice.

Summary procedure was ok.

* CASES IN NOTES ON “Attorney Conduct” and Litigant conduct and court spectator conduct (Casebook, at pp. 121-22, 125) – Martina; Snyder; Ernest; Eaton; Robson – kind of a **Rorschack test**, it seems – the lesson here is err on the side of obeying court orders and customs

In re Little (US Sp Ct 1972) (per curiam) (Casebook, at p. 123) – Little was a *pro se* defendant forced to go to trial without assistance of his attorney because the trial court refused to grant a continuance so as to allow his retained attorney to appear. In his *pro se* closing arguments, Little contended that the trial judge was “biased” and had “prejudged” his case. Based on those remarks, Little was held in criminal contempt in a summary procedure. [For whatever crazy reason, Little’s “mother fucker” comment aimed at judge not considered as a basis for contempt.]

Holding: Not sufficient evidence of criminal contempt – didn’t “imminently” threaten the fair administration of justice – if you can’t object to a judge being biased, how can a biased judge claim ever be preserved for appeal

NEW TOPIC: “Writs of **Assistance**” (possession of property via sheriff, etc.) / “Writs of **Sequestration**” (third party “sequesters” property and collects rents, etc.) / “Writ of **Attachment**” (pre-judgment seizure to protect potential judgment; post-judgment seizure of property) / “Writ of Execution” (third-party, e.g., sheriff, collecting money) [Equitable means of enforcing judgments] – also Writ of Replevin & Garnishment (legal actions)

Hamilton v. Nakai (9th Cir. 1971) (Casebook, at p. 125) – dispute between Indian tribes over tribal lands. Prior court order giving two tribes joint rights in a portion of a reservation as co-tenants. In this case, one tribe filed a motion for a “**writ of assistance**” seeking federal court enforcement of prior court’s judgment. Trial court denied request.

Holding: “implicit” in original court decree was joint possession. Because one of the party tribes refuses to share possession as judgment required, “writ of assistance” should be awarded – i.e., having sheriff (or other court officer, e.g., US Marshal) intervene to enforce original judgment.

* Federal All Writs Act – 28 USC § 1651(a) – quoted on Casebook, at pages 126-27

EQUITABLE DECREES REQUIRING PAYMENT OF MONEY:

Reeves v. Crownshield (NY 1937) – NY law – like the laws passed in many states – provided for means to collect money decrees/judgments. Order to pay money owed to plaintiff, ***enforceable by contempt powers*** of court. Civil judgment required defendant to pay plaintiff \$400 at rate of \$20 per month. Defendant failed to pay, so plaintiff had court find him in civil contempt and imprison him until he paid. Defendant challenged law on constitutional grounds – i.e., it would violate Due Process/Equal Protection to imprison a debtor for inability to pay. Court rejects argument. Here evidence showed that defendant had ability to pay and willfully violated court’s payment order. Not truly a “debtor’s prison” situation.

Cf. Bearden v. Ga. (US Sp Ct 1983) – can’t imprison probationer for honest inability to pay fine – must be willful and must have ability to pay before imprisonment allowed

EQUITABLE REMEDIES ***TRANSFERRING TITLE*** IN PROPERTY – not done in old days (*in personam* jurisdiction only in equity cases). However, today, most states and federal jurisdiction have statutes permitting equity court to actually order transfer of title in property. See, e.g. Fed. R. Civ. P. 70 – federal court may appoint third-party to do so (via writ of attachment or sequestration), or court may order it transferred in a court order if the property is within the territorial jurisdiction of the court

Class Notes – #4

I. Brief review of last night's material:

- * Difference between civil and criminal contempt – civil contempt is **coercive/compensatory** in nature, while criminal contempt is **punitive** in nature – this distinction discussed in Supreme Court's 1994 Bagwell decision – Civil contempt can be "purged," at least where it is coercive in nature
- * Different *procedural* requirements – civil has less protections; criminal contempt requires more, at least if a "**serious**" case [i.e., large fine or > 6 mos. of incarceration], including right to a criminal jury trial and related procedural protections
- * Criminal contempt – may be imposed as a sanction for WILLFULLY violating a court order (usually an injunction) party or his **agent** or **one acting "in concert or collusion"** – Lord Wellesley, Rivas, and United Pharmacal Corp cases
- * Exception for "outsider" who interferes with the execution of court's judgment – ex. of the Hall case – that is, where the contemnor interferes with both the plaintiff's rights and the defendant's duty under the court's order
- * Cape May case (NJ 1880s) as well as Supreme Court's decisions in UMW (1940s) and Walker (1960s) stand for proposition that, once a party gets notice of injunction, they can't defy it and then defend in a criminal contempt case on the ground that the injunction was unconstitutional or that the district court lacked authority to issue the injunction – rare exception would be where the court issuing the injunction CLEARLY lacked jurisdiction
- * Direct vs. Indirect Contempt – more procedural protections for indirect (summary adjudication by trial court in direct case vs. separate proceeding with witnesses in indirect case)

II. Next topic in Casebook is the various common law & equitable "Writs" used to enforce a judgment or decree – ***other than the injunction and concomitant contempt power***

- * **Writ of Assistance** – Hamilton case is an example – a post-judgment equitable writ issued by a court to enforce a prior court judgment or decree that concerned the right to possession of land – the writ is executed by third-party – sheriff/constable in state case, US marshal in federal case
- * **Writ of Sequestration** – historically, a *post-judgment* writ whereby third-party appointed by court (usually sheriff) to execute a court's judgment awarding money or property where defendant refused to comply with judgment (collect rents on defendant's property, etc.); in some jurisdictions today, a *pre-judgment* writ issued to seize realty or personalty and keep in custody of sheriff/marshal pending resolution of litigation [contrast Grupo Mexicano, Casebook at pp.42-43]
- * **Writ of Attachment** – two forms ("attaching" person vs. property): (1) ancient form:

imprison judgment debtor until he paid; (2) modern form: akin to garnishment, but regarding specific property, real or personal (using sheriff)

**** Garfein v. McGinnis** – closest thing to old writ of attachment; mandatory injunction on judgment debtor; hold in civil contempt – so long as willful refusal as opposed to inability to pay

*** Writ of Execution** – “at law” – using sheriff to execute legal judgment (e.g., seizing funds from bank account, selling collateral to get money damages)

* FEDERAL RULE OF CIVIL PROCEDURE 70/ All Writs Act (18 USC § 1651(a))

* old “in personam”/“in rem” distinction re: title to property no longer valid – equitable remedies CAN transfer title – and court may even appoint a third party to do so where defendant refuses

* equitable “writ of *ne exeat regno*” – ancient writ, whereby court made party post bond or go to prison (security against leaving country) pending equity action

III. DECREES REGARDING FOREIGN PROPERTY

Penn v. Lord Baltimore (English 1750) – MASON-DIXON LINE CASE -- dispute over land between Pa. and Maryland. Plaintiff sought specific performance of land agreement ***executed in England***; defendant responded that specific performance not possible regarding “foreign lands.” Court holds that it has *in personam* jurisdiction over parties, so it need not have *in rem* jurisdiction over disputed land.

* Basic holding: so long as court has *in personam* jurisdiction over parties, specific performance may be ordered (and enforced by injunction/contempt), even if land is outside *in rem* (territorial) jurisdiction of court

Leading US Sp Ct case following Penn – Massie v. Watts (1810) (John Marshal, C.J.) –Plaintiff Watts, an Ohio resident, had “beneficial” title or “equitable” title in Ohio land, and defendant, Massie, a KY resident, refused to convey title. Watts sued Massie in a diversity action in federal court in KY. District court held it possessed jurisdiction to order specific performance, notwithstanding that land was in another state. USSCt agreed, following Penn.

Deschenes v. Tallman (NY 1928) – Canadian decree requiring D to transfer title in NY land to P, who then sought to foreclose mortgage against, D. D argued that Canadian decree was invalid because it was only *in personam* against D and not *in rem* against the NY land. Key issue is whether a NY court must give effect to the prior *in personam* decree that resulted in conveyance of title from D to P. NY court says yes.

Burnley v. Stevenson (Ohio 1873) – Ky court ordered estate of Winfield Scott to carry out land contract with plaintiff in that case, Evans. Disputed land was in Ohio. Specific performance ordered. **Moreover, a third-party (“commissioner”) appointed by court executed and delivered deed to Evans.** Scott’s estate then sued in Ohio – where land was located – to recover possession of Ohio lands from Scott’s successor-in-title. Ohio Supreme Court held that action of KY commissioner was a nullity, since it purported to act *in rem* on the Ohio land. However, KY court’s original equitable decree of specific performance (*in personam*) was valid and binding on the Ohio court under the Full Faith and Credit Clause of the U.S. Constitution. Thus, Scott’s estate loses Ohio case.

McElreath v. McElreath (Tx 1961) – Oklahoma equitable divorce decree regarding Texas land owned by couple prior to divorce. Husband flees to TX. Tx Sp. Ct. enforces even though Texas law and public policy different from Okla. TX court actually holds that *in personam* decree must be “enforced” by Texas courts. Doesn’t address Full Faith & Credit Clause issue; goes off on “**comity**” doctrine instead. Under “comity” doctrine, situs state will enforce out-of-state equitable decree unless situs state’s “policy” is FLATLY contrary to other state’s. Here, no major public policy conflict since McElreath’s joint ownership of the Texas land did not grow out of Texas’ “community property” laws (rather, it was based on Oklahoma law, which governed the couple’s marriage and divorce). Ct. avoided Full Faith & Credit issue because of unclear state of USSCt law over effect of conflicting policies between two states.

5-4 DISSENT: “comity” is nonsense here because law/policy of Texas unambiguously contradicts Okla.’s law on the issue. Furthermore, Okla. decree is *in rem* – not *in personam* – and, thus, unenforceable in TX.

Flaunterloy Case (US Sp Ct. 1908) (Casebook, at p.148-49, Note 1) – Under F.F. & C Clause, a civil judgment “at law” must be recognized as *res judicata* by another state’s courts, yet other states’ courts need NOT EXECUTE such a judgment, save situation where it is purely money judgment.

Eaton v. McCall (Maine 1894) – equitable action for foreclosure on a mortgage involving two Maine residents but involving Canadian property. Court only possesses *in personam* jurisdiction over parties, not *in rem* jurisdiction over foreign land. However, court refuses to exercise such jurisdiction – in the form of injunction & contempt power – “except under unusual and extraordinary circumstances.” First, plaintiff must try to foreclose in situs jurisdiction; in effect, “exhaustion” of foreign remedies required before court would act. Because no showing that such a course would be futile in this case, action dismissed without prejudice for parties to litigate the issue in Canada.

Wimer v. Wimer (Va. 1888) – equitable action for partition of land. Va. parties in Va. court; land in W. Va. Ct. dismisses because partition cannot be accomplished by exercise of *in personam* equitable jurisdiction over parties. In effect, would require an *in rem* remedy over out-of-state property.

VI. INJUNCTIONS AGAINST FOREIGN LAWSUITS

Lord Portarlington v. Soulby (English 1834) – court has the power to enjoin parties before it from prosecuting a lawsuit in a foreign court; injunction is not on foreign court; rather, *in personam* injunction on parties in the case

Castanho v. Brown & Root (English 1980) – accident in England involving Texas-based company (B & R); English action to enjoin defendant here/plaintiff there from prosecuting a lawsuit in Texas. Ct. employs a 2-part test for injunction of foreign suit: (1) parties must be “amenable” to English court and “justice can be done at substantially less inconvenience and expense” in England than in foreign country; and (2) injunction must not deprive defendant here/plaintiff there of a “legitimate” advantage available in foreign court. Ct. holds that, because Castahno would get larger damages in Texas than England, an injunction would deprive him of a legitimate advantage. Injunction denied.

British Airways v. Laker Airways (English 1984) – holding that an injunction against parties in a foreign litigation should issue if foreign suit is “unconscionable” or “unjust.” Suit in England to enjoin plaintiff in American antitrust lawsuit; no equivalent cause of action in England. English court holds such a foreign suit is no “unconscionable.” Injunction denied.

Vanneck v. Vanneck (NY 1980) – divorce/child custody dispute – NY marriage fell apart; wife took kids to their vacation home in Connecticut; wife sued for divorce, alimony, and child custody in Conn. Two weeks later, husband sued for divorce in NY and also sought custody of children. Husband also sought to enjoin wife from proceeding with her lawsuit in Conn. Trial court granted injunction of wife’s entire action in Conn.

Holding: Traditionally, an injunction would be appropriate to enjoin foreign divorce action when rights of resident spouse are threatened. However, because child custody also at issue, Uniform Child Custody Jurisdiction Act (UCCJA) comes into play. Changes traditional equitable formula. Trial court ordered to follow UCCJA and “open lines of communication with Connecticut court [as required by the Act] before enjoining the action there.” Divorce portion of wife’s case could be properly enjoined.

NOTE: as a general matter, all things being equal, “first come, first served” rule applies to concurrent state litigations

Dobson v. Pearce (NY 1854) – Original NY court judgment on debt; subsequent Conn. chancery court enjoined winning NY party from seeking to enforce fraudulently-obtained judgment; Conn. decree collaterally estopped plaintiff in NY case

*court in one jurisdiction may enjoin successful party in another jurisdiction from seeking to enforce/execute a foreign judgment obtained by FRAUD [judgments may be collaterally attacked as obtained by fraud]

James v. Grand Trunk West. RR Co. (Ill. 1958) – court in Illinois originally acquired jurisdiction over case; defendant in Ill. case then goes into Mich. ct. and obtained an injunction against the

plaintiff in the Ill. litigation; plaintiff in Ill. case the seeks a “counter-injunction” against the defendant. Ill. Sp. Ct., following the “first come, first served” principle, approves counter-injunction. Full Faith & Credit Clause and “comity” doctrine inapplicable to counter-injunction.

DISSENT: Potential for never-ending ping-pong match between courts of two different jurisdictions

Donavan v. City of Dallas (US Sp Ct 1964) – state action first, plaintiffs lost; they then filed federal action next, which was essentially the same suit. Ds filed a writ of prohibition in the Texas courts, which ultimately led to an injunction of the federal Ps by the state court. Federal district court then dismissed federal case. Federal Ps appealed to Fifth Circuit from the federal district court’s dismissal. Texas courts subsequently held them in contempt for violating its “valid order” enjoining the federal lawsuit (including an appeal) and imposed 20 days in jail and fine. (In the meantime, some federal Ps filed a separate action in federal court seeking a “counter-injunction,” i.e., to enjoin Texas courts from enjoining Ps in federal case.) US Sp Ct granted cert. to review Texas court’s injunction/contempt order.

Holding: state courts had no power to enjoin federal Ps or hold them in contempt. No right even if only *in personam* injunction against party. Rationale: Congress created right to federal court access; state can’t interfere. (Assumption, of course, is that state case would be *res judicata* in a subsequent federal case.) US Sp Ct. vacates contempt order and remands for Texas courts to determine whether contempt penalty is appropriate since underlying injunction was declared invalid by US Sp Ct.

DISSENT: injunction/contempt order proper since federal court action “vexatious”

“Younger Abstention Doctrine”:

Younger v. Harris (US Sp Ct 1971) – federal district court enjoined D, state DA, from prosecuting defendant based on First Amendment violation. P, Harris, had already been indicted in state court. Anti-Injunction Act – 28 U.S.C. § 2283 – 3 statutory exceptions thereto, and one “judicial exception” (no adequate remedy at law; “irreparable injury”). Ct. doesn’t reach Anti-Injunction Issue – goes off on “Comity”/“Federalism”/equitable considerations. Contrast Dombrowski (1965) – lawless, racist prosecutor – “bad faith” prosecution. No evidence of “bad faith” prosecution here. Mere First Amendment “chilling effect” not enough of injury. Federal civil plaintiff/state defendant has adequate remedy at law, i.e., appeal of criminal conviction within the state court system.

* future prosecution vs. on-going prosecution – subsequent cases said no bar if only future prosecution, i.e., no charge filed in state court (but federal case stops once any court proceedings of substance begin) – Wooley & Steffel – Note 3, Casebook, at p. 186

Samuels v. Mackrel (US Sp Ct 1972) – Younger abstention doctrine applies to Declaratory Judgment Acts under same circumstances

* Likely applies to sec. 1983 money damages cases as well

Mitchum v. Foster (US Sp Ct 1972) – section 1983 cases fall within “expressly authorized” exception to Anti-Injunction Act

CLASS NOTES – #5

I. Review of last class

A. Equitable decrees regarding foreign property (“foreign” meaning another state or another country)

* Leading case is Penn v. Baltimore (English 1750) – where parties are properly before it, a court has power to specifically enforce land contract involving foreign property; yet *in personam* decree on parties; not an *in rem* decree on the foreign property; enforceable through court’s contempt power

* Penn followed in United States after Independence – Massie v. Watts (Marshall, J.)

* **Res judicata/collateral estoppel effect** of foreign *in personam* equitable decree – so long as foreign decree involved same parties & same factual issue (same property), court in state in which property exists will generally follow foreign decree – only *in personam* decrees, not foreign extraterritorial *in rem* judgments – Burnley v. Stevenson (Ohio 1873)

* With respect to a state court’s *in personam* decree regarding property in another state, **Full Faith & Credit Clause** of U.S. Constitution **requires** “situs state” to respect it – but only as a *res judicata* matter – situs state not required to actually enforce/execute foreign decree [only money judgments must be executed under FF&C Clause]

EXCEPTION: FF& C Clause generally does NOT require situs state to follow foreign decree if it would directly contradict situs state “policy”

* Related “**comity**” doctrine – Even where Full Faith & Credit Clause may not require situs state to respect other state’s extraterritorial decree under U.S. Const., “comity” doctrine is a “prudential” approach taken by many state courts – see, e.g., McElreath case (Tx. Sp. Ct.)

* In cases of disputes over extraterritorial land, some courts follow a doctrine of “exhaustion” of situs jurisdiction’s remedies first – at least where no evidence that it would be hardship or unfair to one of the parties -- Eaton v. McCall (Maine 1894) – REMEMBER: Equity is “discretionary”

B. Equitable decrees regarding foreign lawsuits

* An *in personam* jurisdiction **on parties** in foreign action – not an injunction aimed at foreign court – enforceable through court’s contempt power

* Various “tests” to determine whether court should exercise equitable discretion to enjoin parties in a foreign lawsuit – e.g., Brown & Root Case ([i] parties “amenable” to court and suit would result in substantially less expense and inconvenience [ii] one of the parties would not be deprived of a “legitimate advantage” if foreign suit did not go forward)

*** U.S. CASES ON ANTI-SUIT INJUNCTIONS – differing approaches – all cases generally apply equitable principles: Laker Airways v. Sabena Belgian Airways, 731 F.2d 909 (D.C. Cir. 1984) (over Judge Kenneth Starr’s dissent on “comity” grounds); Kaepa v. Achilles Corp., 76 F.3d 624 (5th Cir. 1996) (over Judge E. Garza’s dissent on “comity” grounds)

* Generally speaking, “FIRST COME, FIRST SERVED TEST”

* Foreign court may enjoin parties from executing judgment/decreed obtained in first case if first was obtained by fraud – In Dobson v. Pearce (NY 1854), NY Court of Appeals held that such a foreign court’s injunction based on fraud would collaterally estop party who was found have acted fraudulently in original jurisdiction

* Special consideration involved on child custody disputes – UCCJA – modifies traditional “first come, first served” rule

* Problem of “counter-injunction” – potential for never-ending judicial ping-pong match between courts of different jurisdiction – courts differ on approaches here in view of “comity” doctrine

* Donavan v. City of Dallas (USSpCt 1964) – EXCEPTION TO RULE THAT ONE COURT MAY ENJOIN PARTIES IN FOREIGN LITIGATION – state court MAY NOT enjoin parties in federal court, even if it is clear that prior state judgment would be *res judicata* in subsequent federal case (yet *res judicata* defense still available in subsequent federal case)

* ANOTHER EXCEPTION TO GENERAL RULE: Younger v. Harris (US Sp Ct 1971) – “Younger Abstention Doctrine” – ***once state charges are filed***, federal court may not enjoin state prosecutor from prosecuting a state criminal defendant unless prosecution shown to be in “**bad faith**,” even if that state prosecution is based on an unconstitutional statute, *unless* challenged statute is “flagrantly and patently violative of express constitutional prohibitions in **every clause, sentence, and paragraph** and in whatever and against whomever an effort might be made to apply it” [*compare* exception mentioned in Walker v. B’ham regarding a litigant’s right to ignore an injunction when court CLEARLY lacked authority/jurisdiction to issue it]. Court reasons that “FEDERALISM” and “COMITY” require such abstention. Ct. applies traditional two-pronged equity test: (1) irreparable injury and (2) no adequate remedy at law → adds “**great and immediate**” qualifier to injury requirement [mere First Amendment “chilling effect” not enough]. Here, state defendant has an “adequate remedy at law” (state appeals process, including direct review by US Sp Ct via certiorari)

* Younger also applies to federal Declaratory Judgment Act actions

* Younger does not apply to cases where **no pending state prosecution**

* Court in Younger mentioned – but did not rely on – the federal Anti-Injunction Act, 28 USC sec. 2283 – that statute generally prohibits federal injunctions of state suits or enforcement of state judgments, civil or criminal, unless (1) Congress expressly authorized it; (2) “in aid of” federal court’s pre-existing jurisdiction; or (3) to protect prior federal court judgment

* Subsequent to Younger, Ct. held that sec. 1983 civil rights cases fall under “express authorization” exception of Anti-Injunction Act – Mitchum v. Foster (1972) – thus, in a sec. 1983 action, Anti-Injunction doesn’t bar a federal court injunction of state case, although Younger’s “prudential” abstention doctrine will apply nonetheless if state charges pending and state prosecution not brought in “bad faith”

* Concept of “bad faith” under Younger – prime example would be finding by federal court that prosecutor or court (or a state administrative tribunal) was biased or not impartial – e.g., Dombrowski and Gibson v. Berryhill (Casebook, at pp. 196-97, Note 2) [biased state optometry board]

II. NEW MATERIAL

O’Shea v. Littleton (US Sp Ct. 1974) – sec. 1983 action by numerous African-American citizens of Cairo, Illinois against local police, prosecutors, and court officials – based on alleged pattern of discriminatory conduct in the local criminal justice system. Allegations all concerned **PAST** wrongs; no present allegations of pending prosecutions and discrimination; no claim that any penal laws invalid; just applied in a discriminatory manner; also, NO MONEY DAMAGES SOUGHT; **only an injunction sought**. Fed. dist. ct. dismissed; Seventh Circuit reversed and remanded for trial. US Sp Ct’s holding: no “case or controversy” under Art. III – not concrete enough, since no present or future discrimination specifically alleged – needs to be “sufficient immediacy and reality” in allegations to pass muster under C & C requirement – allegations here too remote

Dicta: Ct also states, “[t]he foregoing [Art. III, C & C requirement] considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief.” Ct. alternatively holds that, even if there were a C & C, the complainants failed to present an adequate basis for equitable relief – no “great and immediate” irreparable injury alleged and no proof that inadequate remedy at law [change of venue, motion to recuse, direct and habeas review, incl. review by US Sp Ct]

* Federalism/comity problems – too much federal court “supervision” would be required – way too messy

Huffman v. Pursue, Ltd (US Sp Ct 1975) – applying Younger abstention doctrine to state *civil* action by state’s attorney in a “public nuisance” case (local authorities seeking to shut down a porno theatre). After state trial court shut down porno theatre as “public nuisance” under a state obscenity statute, theatre owner went into federal court on a sec. 1983 action (rather than appealing within the state appellate court system). Dist. ct. held that state obscenity statute was partially unconstitutional and granted injunction against enforcement of part of state trial court’s injunction. Holding: Ct. applies Younger to **state civil case** involving the state (or entity thereof) as a party, at least where, as here, **valid state interests** sought to be enforced are akin to criminal statute. Same consideration of “federalism” and “comity” apply. Fact that federal court intervention occurred after trial doesn’t matter, since state litigant did not appeal to state appellate courts – **“exhaustion” of state appellate remedies** required as a “necessary concomitant” of Younger. No evidence that state appellate courts would have been biased [key theme: federalism requires respect of coordinate branches of state court]

– federal court can’t assume that state judges are hostile to federal constitution – they take oath, too]

* Premise of Younger abstention is “ADEQUATE REMEDY AT LAW” in state court system, i.e., that litigants have an meaningful opportunity to raise federal law issues in state proceedings – if no opportunity to do so, then Younger would not bar federal lawsuit. Similar premise in Walker v. B’ham – Ct held that MLK, Jr. et al. had an opportunity to challenge constitutionality of injunction/parade ordinance in Alabama state courts, so contempt finding not unconstitutional where they failed to do so.

* Younger subsequently extended to other types of civil cases, even cases not involving actions where the state was a direct party – see Casebook, at 206, Note 2 – child custody cases, state bar attorney disciplinary proceedings, civil contempt. These are cases involving significant “state interest” in the state civil litigation.

* Younger also applies to state administrative proceedings that are “**judicial**” in nature, at least where there is subsequent state *judicial* review of the admin. ruling

* Perhaps the greatest extension of Younger in a case involving private parties is Pennzoil Co. v. Texaco (1987) – \$10 billion jury verdict in Texas civil case between two oil giants – Texas law required a “supersedeas bond” in amount of judgment to stay enforcement of judgment pending appeal. Pennzoil, rather than challenging this requirement as unconstitutional in Texas courts, sought an injunction on constitutional claim in a sec. 1983 action in NY federal court. US Sp Ct held that Younger applied to this case since state has interest in allowing its courts to determine constitutionality of supersedeas bond issue.

Ohio Civil Rights Comm’n v. Dayton Christian Schools (US Sp. Ct. 1986) – as a part of employment contract with its teachers, a private Christian school required teachers to submit employment disputes through the “biblical chain of command” at school and agree not to file civil lawsuits; school told pregnant teacher that she would be terminated because of school policy that mothers must stay at home with their children. She threatened suit in violation of “biblical command” provision and was fired. Teacher then filed complaint with state civil rights commission (as first step toward civil rights lawsuit); administrative proceedings commenced against school. School then filed sec. 1983 action in federal court, seeking an injunction on the ground that the state admin. body’s pending case against school violated First Amendment. District court refused injunction, but Court of Appeals reversed and held that injunction should have issued on First Amendment grounds.

US Sp Ct’s Holding: Younger doctrine applied here – it applies to ANY state judicial or admin. proceeding involving “IMPORTANT STATE INTERESTS” so long as parties have meaningful opportunity to raise federal constitutional issues in state system. In case of an admin. proceeding, Younger applies so long as there is subsequent state judicial review whereby federal constitutional issues may be raised.

* Ct notes that Abstention Doctrine is not “Jurisdictional” – rather, DISCRETIONARY (rooted in EQUITY)

Burford v. Sun Oil Co. (1943) Abstention Doctrine:

New Orleans Public Service, Inc. v. New Orleans City Council (US Sp Ct 1989) – state utility rate-setting dispute. New Orleans city council denied electricity rate increase. Utility then filed federal case – seeking declaratory and injunctive relief -- that contended that New Orleans city council's action was illegal because it was “pre-empted” by federal law governing utility rate-making. Federal district court abstained under Burford and Younger and utility appealed to 5th Circuit. While federal litigation was pending, utility administratively “appealed” to state court in Louisiana, and raised preemption claim. 5th Cir. also applied Burford and Younger and abstained.

US Sp Ct's Holding: First discusses Burford Abstention Doctrine: where pending state admin./judicial proceedings (if admin, where judicial review by state courts), federal court abstention required where proceeding involves “difficult” questions of state law/policy within expertise of state bodies. Ct. holds that lower federal courts erred in this case in applying Burford, where no such complicated issues of state law/policy – all that is really at issue here is federal preemption issue. Ct. next addresses Younger issue: No applicable here, because state admin. proceeding is not “judicial” in nature. Judgment of Fifth Circuit and federal district court reversed.

* NOTE: Merely because there are concurrent state/federal proceedings DOES NOT mean that the federal court should automatically abstain – Younger, etc. doctrines are EXCEPTION TO THE RULE that federal courts ordinarily must exercise their jurisdiction

Railroad Comm'n v. Pullman (1943) Abstention Doctrine: stay – not dismissal – of federal court action where a “difficult and unsettled question of state law” is a predicate to resolving a federal constitutional issue (not a case, like Younger, where federal court called on to stay or enjoin state proceeding)

Colorado River Water Conservation District v. U.S. (1976) Abstention (Dismissal) Doctrine: where no other abstention doctrine applies, federal court should still consider whether to stay or dismiss its own proceedings because of pending state litigation involving same issue – multi-factor test; key seems to be whether case turns more on state law or federal law and whether state forum will protect the federal plaintiff's rights – US Sp Ct said that such a stay/dismissal is “EXCEPTION” because federal courts ordinarily have an “unflagging obligation” to exercise its jurisdiction

Rizzo v. Goode (US Sp Ct 1976) – similar case to O'Shea v. Littleton, *supra* (although here citizens did not seek to enjoin or have federal court supervision of state criminal prosecutions) – Sec. 1983 action by citizens against Philadelphia police department based on an allegedly “pervasive pattern of illegal and unconstitutional mistreatment by police officers,” particularly against African-Americans. Record showed only 16 examples of police misconduct rising to the level of a federal constitutional violation; in four of those cases, police department took inadequate action in response to citizen complaints. Dist. ct. found no “policy” by police or city to violate constitutional rights; rather, just a handful of isolated incidents involving non-party police officers. Dist. ct. issued injunctive relief, requiring police to change citizen complaint policy as a means of preventing “future” abuses.

US Sp Ct's Holding: record in this case fails to show a pattern or policy of constitutional violation by named plaintiffs; district court's affirmative equitable relief merely aimed at preventing "future" abuses. Ct. cites O'Shea and holds that no "real and immediate" injury alleged here -- "unprecedented theory of § 1983 liability." Rejects "prophylactic" nature of equitable remedy here, which violated well-established principle that **"the nature of the [right] violation determines the scope of the remedy"** – FEDERALISM CONCERNS, too – **"principles of federalism ... determin[e] the availability and scope of equitable relief"** – applies to sec. 1983 actions against police conduct unrelated to prosecutions as well as actions against state prosecutors and judiciary in state criminal prosecutions (O'Shea)

Missouri v. Jenkins (US Sp Ct 1995) – 5-4 controversial decision by closely-divided court [same split as Bush v. Gore] -- Two-decade old School Desegregation Case in Kansas City, Mo – major remedial decrees (in form of injunctions) entered by federal district court at cost of hundreds of millions of dollars – "the most ambitious and expensive remedial program in the history of school desegregation" litigation [Brown v. Bd. of Ed.; Swann v. Charlotte-Mecklenburg Bd. of Ed.; Milliken v. Bradley – series of prior US Sp Ct cases dealing with federal court equitable intervention in school deseg cases]

5-4 majority's holding: Dist Ct exceeded its equitable remedial authority

KEY PRINCIPLES EMBRACED BY MAJORITY:

- * federal court intervention should be aimed at remedying discrimination in education – not aimed at curing larger societal discrimination
- * Equitable remedies must be tailored to, and determined by, the nature and scope of the particular constitutional violation at issue
- * Goal of remedy is to RESTORE the victim(s) to where they would have been BUT FOR the unconstitutional action by state actors – not cure all of society's ills related to racism
- * Federalism concerns

Majority rejects lower courts' holding that, because KC schools remained largely black, a remedy beyond *intra*-district proportions was required. Majority struck down *inter*-district remedies as beyond scope of constitutional violation. Also rejected district court's efforts at involving State, as opposed to local school authorities, in remedying discrimination. Majority criticized the district court for trying to cure discrimination not attributable to relevant state actors and by failing to recognize that "external factors" beyond the control of the State and local authorities affected racial composition of schools and performance by African-American students

MODERATE AND LIBERAL DISSENT (5-4) – demonstrates how much judges's particular ideologies factors into remedies law, particularly equitable remedies, where a judge's subjective morality is a key consideration

INJUNCTION AS TO FOREIGN ACTS:

The Salton Sea Cases (9th Cir. 1909) – dist. ct. entered injunction against D – who was properly before court – with respect to property located in Mexico that was causing damage to P’s property within jurisdiction of court. 9th Cir. affirms; equitable *in personam* jurisdiction existed since parties properly within court’s jurisdiction.

Madden v. Rossetter (NY 1921) – agreement between P and D – both properly within NY court’s jurisdiction – to share horse. By terms of agreement, D got it for period of time in Calif. and P then was to get horse for period of time in Ky. D tried to alter terms of contract and refused to relinquish horse to P. P sued for a “mandatory injunction” – i.e., specific enforcement of the contract – requiring D to ship P to Ky from Calif. Over D’s objection to NY court’s equitable jurisdiction, court grants injunction and appoints a third-party receiver to see that horse was shipped to Ky.

CLASS NOTES – #6

I. Review of last class:

Younger abstention doctrine – “prudential,” not “jurisdictional” – rooted in federalism/comity

O’Shea and Rizzo v. Goode – US S Ct cases, in which Court held that section 1983 plaintiffs allegations about problems with the local criminal justice systems did not justify federal court injunctions. Court focused on fact that the records in those cases did not show sufficient likelihood of *future* injury – past injuries, by themselves, did not justify *prospective* injunctive relief. This was particularly true in view of precedent such as Younger v. Harris in the context of a federal injunction against state actors – FEDERALISM CONCERNS-- neither a “great and immediate” *future* harm alleged nor did plaintiffs establish that there was no adequate remedy at law. Cases stand for proposition that FEDERAL EQUITABLE RELIEF INVOLVING STATE ACTORS WILL GO NO FURTHER THAN THE NATURE OF THE ALLEGED CONSTITUTIONAL VIOLATION – no such thing as a “prophylactic” injunction here

Huffman v. Pursuel Ltd. – US Sp Ct held that Younger’s “abstention” doctrine applied to a state court civil action that was akin to a state criminal case – there state brought a “public nuisance” civil complaint (seeking an injunction) against a porno theatre. Court also held that, when Younger applies, a state litigant must “exhaust” all available state appellate remedies before going into federal court – FEDERALISM (trust of state judges to apply U.S. Const.)

Dayton Christian Schools (1986) – Ct broadly held that Younger applies to any state civil judicial or “quasi-judicial” administrative proceeding that implicates an “IMPORTANT STATE INTEREST,” whether or not the state is a party

*Younger applied to all sorts of civil actions, even those not involving state as a party – leading case is Pennzoil v. Texaco (1987)

OTHER ABSTENTION DOCTRINES:

* Burford Abstention: when concurrent state proceeding involves complex state regulatory law or policy within the expertise of the state judicial or administrative body

* Pullman Abstention: when concurrent state proceeding involves “difficult and unsettled questions of state law” – STAY, NOT DISMISSAL

* Colorado River Abstention: when no other abstention doctrine applied, federal court can still abstain – stay or dismiss – in deference to concurrent state litigation – multi-factor test – not mandatory or encouraged the way the other abstention doctrine are

Missouri v. Jenkins (1995) – evidence was that, after 20 years of school desegregation orders, largely black schools still existed – district court issued a new round of deseg. remedies -- 5-4 majority held

that it, after two decades and millions of dollars, state and local school officials had shown enough compliance with original decree to justify dissolving desegregation injunction – Ct. held that district court erred by refusing to dissolve injunction since CONTINUING REMEDY proposed by district court went beyond the constitutional violation attributable to state actors

* FEDERALISM CONCERNS THROUGHOUT

* Goal of federal equitable remedy is to cure constitutional rights violation at issue, but nothing more – federal school desegregation can't cure all of society's ills. Majority of Court held that dist. ct. was failing to account for "external" factors that explained continued racial imbalance in schools

Injunctions on Foreign Acts: Salton Sea Cases and Madden v. Rossetter – if courts possess *in personam* jurisdiction over the parties, then courts can enjoin parties or issue other equitable relief requiring parties to perform ACTS OUTSIDE THE JURISDICTION – and enforce such extraterritorial actions through the contempt power – **similar to cases involving *in personam* equitable decrees over parties regarding foreign property or foreign lawsuits**

II. NEW MATERIAL:

Chapter 4: "THE INJUNCTION"

TRO <-----> Prelim. Injunction <-----> Permanent Injunction

Hughes v. Cristofane (D. Md. 1980) – Plaintiff, topless bar, sought a TRO against sexually-oriented ordinance. Court addresses Fed. R. Civ. P. 65, which governs injunctive relief. Court cites traditional factors governing a request for temporary or preliminary injunctive relief: (1) **irreparable harm**; (2) plaintiff's hardship without an injunction outweighs the hardship that a stay would cause to the defendant; (3) likelihood of success on the merits; (4) injunction would not cause a "substantial harm" to the public; and (5) **no adequate remedy at law**. These factors are not set forth in the Rule; rather, they are common-law factors. Ct. applied various factors and granted TRO.

Rule 65 (Casebook, at 256) – differences between TRO and preliminary injunction – notice, 10-day time limit, interlocutory appeal

Abbott Labs v. Mead Johnson & Co. (7th Cir. 1992) – Pedialyte vs. Ricelyte case – Lanham Act case (false advertising & "trade dress" dispute) – Dist. ct. denied Pedialyte's request for a prelim. injunction against Ricelyte. 7th Cir. disagreed. Ct. sets forth multi-factor test – calls it a 4-part test (however, second factor merges two separate things – no adequate remedy at law & irreparable harm): (1) "some likelihood" of success on merits; (2) no adequate remedy at law; (3) irreparable harm; (4) balance hardships (in particular, balancing "irreparable harms"); and (5) "public interest" (non-parties) factor. Ct. holds that (1) - (3) are "thresholds"; once those three are met, then court will consider (4)-(5) and, "**sitting as would a chancellor in equity**," "weighs" all the factors. If (1)-(3) not met, then preliminary injunction denied. In balancing the hardships, a court must apply a

“sliding-scale” approach regarding the success-on-the-merits factor (i.e., the more likely the plaintiff is to succeed on the merits, then the less the balance of the parties’ respective harms need to favor the plaintiff). NOT MATHEMATICAL APPROACH; RATHER, SUBJECTIVE AND INTUITIVE. Abuse-of-discretion standard on appeal.

[ONE EXAMPLE OF THE MULTI-FACTOR STANDARD FOR PROVISIONAL INJUNCTIVE RELIEF – i.e., TRO, prelim. injunction, stay pending appeal, USED BY COURTS – DIFFERENT FORMULATIONS; REALLY ALL SUBJECTIVE, INTUITIVE EQUITABLE TESTS]

7th Cir.’s application of the standard to facts of this case:

[A] re: **false advertising claim**: (1) Abbott, the plaintiff, has likelihood of success on merits; (2) district abuse discretion in finding that plaintiff had an adequate remedy at law and finding that hardships balancing thus favored defendant, Mead Johnson [dist. ct. reasoned that full-fledged permanent injunctive relief after a trial on merits would oust Ricelyte from the market and that Pedialyte could easily determine its money damages at that point] – 7th Cir. vacates and remands for dist. ct. to reconsider prelim. injunction request by assuming that a less severe permanent injunction might not totally oust Rice from market (which in turn would not render Abbott’s remedy at law inadequate). Ct. also strongly suggests that any violation of the Lanham Act is prejudicial *as a matter of law* and, furthermore, mere money damages would not be an adequate remedy at law; (3) same rationale in terms of disagreeing with district court’s finding that prelim. injunction would harm “public interest” because it would take Ricelyte out of the market.

[B] re: **“trade dress” claim**: (1) disagrees with dist. ct.’s conclusion that plaintiff had not established a likelihood of success on the merits; (2) disagrees with dist. ct.’s conclusions re: adequate remedy at law and balancing of hardships for same reasons stated *supra*.

LeSportsac, Inc. v. K-Mart Corp. (2d Cir. 1985) (Casebook at 265-66, Note) – court offers alternative definition of “likelihood of success on merits” – “sufficiently serious questions going to the merits to make them a fair ground for litigation” → cf. standard for bail on appeal in criminal case

Coyne-Delaney Corp. v. Capital Development Board (7th Cir. 1983) – issue: whether, and in what amount, a federal district court may award damages to non-moving party when the TRO/prelim. injunction granted at the request of the moving party is later reversed on appeal.

Facts: sec. 1983 case, where P sought and obtained a TRO and preliminary injunction. D asked for a \$50,000 bond; district court refused, and instead required only a \$5,000 bond. On appeal, the 7th Cir. reversed prelim. injunction. On remand, D moved for \$56,000 damages and court costs. Dist. Ct. refused, finding that motion for prelim. was filed in “good faith” and was “non-frivolous.”

Holding: Rule 65(c) provides for security to be paid in prelim. injunction and also “for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” ISSUE #1: May a dist. ct. deny damages here merely because

prelim. inj. motion filed in “good faith”? 7th Cir.: no, more complicated inquiry – must consider other factors (e.g., whether D sought to mitigate damages; whether bond amount was set to low, etc.). ISSUE #2: If damages are to be awarded, are damages limited to the amount of the security/bond? 7th Cir.: Yes, so long as P did not act in bad faith. [If P acted in bad faith, then damages can be sought above amount of bond.]

* Ct. notes that any seeming unfairness of this rule can be mitigated if a D moves an appellate court to increase bond amount, which did not occur in this case

MANDATORY INJUNCTIONS:

* Historically, it was believed that equity courts lacked power to issue mandatory injunctions; over the years, however, courts granted mandatory injunctions in certain special circumstances

Vane v. Lord Barnard (English Chancery 1716) – P, son of D, Lord Barnard. Upon marriage of P, D granted him the remainder interest in a castle. Subsequently, P got angry at his son and, in order to punish him, got “two hundred workmen together” and started to strip the castle of anything of value. Ct. issues a two-pronged decree: (1) prohibitory injunction against further waste; (2) order that castle be repaired. However, rather than actually order a mandatory injunction, ct. then appointed a master to oversee repairs, at cost of D.

Cooling v. Security Trust Co. (Delaware 1946) – P is mother of two minor beneficiaries of a trust; D the trustee. D also co-executor of estate of father, whose will created the trust. P alleged that D failed to file “exceptions” to accounting of estate by other co-executors. Statute of limitations on filing exceptions due to run, so P moved for a “preliminary mandatory injunction” shortly before the S-O-L was due to expire. Court granted it; D moved to dissolve it, contending that court lacked power to grant such a “mandatory” injunction. Court disagrees; holds it has such power, at least to “preserve the status quo.”

* usually injunctions to preserve status quo are prohibitory, yet sometimes the status quo “**is a condition not of rest but of action**” – in latter case, mandatory injunction may be appropriate because the condition of rest is what will cause harm pending outcome of litigation

Moreno Water Co. (9th Cir. case in Note on Casebook, at p. 274) – ct. approves of a preliminary mandatory injunction “**pendente lite**” – P moved court to force D to permit P to transport water through D’s irrigation system – court granted motion pending resolution at trial.

United States v. Price (3d Cir. 1982) (Re, J.) – United States sought a preliminary injunction requiring D, Price, and other commercial landfill operations, to: (1) fund a diagnostic study on the threat to Atlantic City’s public water supply caused by toxic waste in the landfill; and (2) provide an alternate water supply to homeowners whose wells have been contaminated by landfill. Dist. ct. denied requested prelim. injunction. On appeal, 3d Cir. affirms district court under the “abuse of discretion” standard. However, in dicta, appellate court was critical of dist. ct.’s unduly restrictive view of federal equity powers in fashioning a preliminary injunction. Ct. stresses “FLEXIBILITY” and “BROAD POWERS.” Such powers must be adapted to the changing needs of a complex

modern society. Also notes that the relevant **clean water statutes** not only adopt the common law's broad view of equity but go even farther – an injunction may issue only on a showing of a “risk” of harm – as opposed to a showing of “irreparable harm.” Ct. notes traditional factors governing grant or denial of preliminary injunction. Ct. rejects argument that what U.S. was really seeking was \$ damages because, if granted, the injunction would require D to pay money to fund study. Not “substitutional relief” (not compensatory); rather, rationale of payment of money was to prevent further harm. —> Ct. nevertheless affirms b/c (1) subjects of proposed prelim. injunction were only small fraction of all Ds; and (2) D, the US Gov't, could pay for study and seek reimbursement later [might be different result if private P]

Friends for All Children, Inc. v. Lockheed Aircraft (D.C. Cir. 1984) (Starr, J.) – P's are Vietnamese orphans in France who were injured by an aircraft crash in Vietnam. Sued D for various things, including money damages and a mandatory injunction pendente lite requiring D to fund diagnostic exams of children. Finding that children would suffer an “irreparable injury” without exams, dist. ct. granted mandatory injunction. D ordered to pay registry of court \$450,000 to fund exams. At time that injunction granted, ct. had already found D liable; ct. simply had not yet assessed damages.

On appeal, D.C. Cir. held that mandatory injunction was proper. D relies on Learned Hand's decision in Sims v. Stuart, in which he held that a mandatory injunction requiring D to pay money – when the ultimate relief sought is money damages – is inappropriate because the plaintiff has an “adequate remedy at law” (i.e., damages). Ct. distinguishes Sims. Here, liability already determined – only remaining issue is damages. Moreover, exams are aimed at preventing even more damages in the future, so in some ways it is in D's interest. That is, Ps trying to mitigate damages – they just need D to fund exams in order to do so.

SPECIFICITY OF INJUNCTION:

Collins v. Wayne Iron Works (Pa. 1910) – P filed nuisance action against D iron works, seeking injunction to stop undue noise. Vague, sweeping decree (*quoted in* Casebook, at p. 281). On appeal, Pa. Sp. Ct. vacates injunction not being specific enough. Decree must be “definite, clear and precise in its terms as possible.” ----> cf. John O'Quinn case (sleeping in jury room)

* “The entry of an injunction is, in some respects, analogous to the publication of a penal statute” —> with respect to due process “notice” requirement.

* An injunction cannot be so vague & sweeping that it runs the risk of being interpreted as being BROADER than necessary [equitable remedy must be specifically tailored to violation of P's rights]

Holding: because evidence in record suggested that iron works need not be entirely shut down in order to avoid being a nuisance, appellate court actually MODIFIES scope of injunction on appeal (Casebook, at p. 282) —> usual course is to vacate and remand for dist. ct. to rewrite it

* Terms of an injunction must, like a penal statute, be reasonably understandable to the average person – cf. VOID FOR VAGUENESS doctrine – “fair notice” rationale

* Terms of an injunction cannot be unnecessarily sweeping – cf. OVERBREADTH doctrine

“EXPERIMENTAL” INJUNCTION – Georgia v. Tenn. Copper Co. (US Sp Ct. 1907) (Casebook, at 283, Note 3) & Brown v. Board (US Sp. Ct. 1954) (“with all deliberate speed”) – court’s decree gives D some leeway in complying with terms of injunction – not hard-and-fast rule of compliance – EQUITY IS FLEXIBLE

Schmidt v. Lessard (US Sp Ct. 1974) (**per curiam**) – sec. 1983 class action lawsuit by a woman on behalf of all persons involuntarily committed in Wisconsin. Dist. ct. grants declaratory and injunctive relief – finding state’s involuntary commitment statute unconstitutional. Ct.’s opinion and final judgment were curt and conclusory (Casebook, at p. 284). US Sp Ct **summarily** vacates and remands. Need for more specificity for two reasons: (1) notice/compliance rationale; and (2) facilitates meaningful appellate review.

Ladner v. Siegal (Pa. 1930) – trial court modified its prior equitable decree the following year; issue is whether an injunction or other equitable decree is “final” – as are most legal orders – or whether it may be modified. Ct. holds that injunctions and other forms of equitable relief may be MODIFIED at any time based on changed circumstances if it is necessary to achieve justice – equitable decrees are “ambulatory”

Emergency Hospital of Easton v. Stevens (Md. 1924) – P, Dr. Stevens, sued D hospital for denying him surgical privileges contrary to hospital’s by-laws. Hospital answered that by-laws had been amended since that time, requiring permission of directors (which P had not obtained). Court held that because P had not been given proper notice of amended by-laws, hospital couldn’t rely on amendment by-laws. Three months later, hospital again amends by-laws, this time giving P – and all other doctors -- notice thereof. Hospital again denied him surgical privileges. P goes to court again and contends that the hospital has violated the terms of the injunction and held in contempt.

Trial court agreed and appellate court affirmed. Appellate court reasoned that, it was not for hospital for itself to determine whether “changed circumstances” justified modification or rescission of injunction.

Board of Educ. (Okla. City) v. Dowell (US Sp Ct 1991) – school board sought dissolution of three-decade old school deseg. decree. Dist. Ct. agreed, but Court of Appeals reversed. S. Ct., per Rehnquist, held that dist. ct. did not abuse discretion in dissolving the injunction. Facts: complex procedural history – back and forth in appellate orbit. Primarily at issue was “student reassignment plan” (“SRP”) in 1984 – which would lead to one-race schools again. Plaintiff contended that the SRP was a violation of original decree. S. Ct. held that ***school deseg. decrees not intended to operate perpetually***. Once harm directly attributable to constitutional violation remedied, federal equity supervision over school system should not continue to exist. Court of Appeals for Tenth Circuit applied to rigorous test in terms of evaluating whether conditions had sufficiently changed to justify dissolution of injunction. Court of Appeals also failed to consider evidence of ***school board’s good-faith efforts at compliance over the years***. Looking at perspective of 1984 – after 20-odd years of good-faith compliance – 1984 SRP may not have been a continuing violation. Vacated and remanded for district court to reconsider dissolution request in view of Sp. Court’s opinion – in particular, whether the purposes of the original injunction had been sufficiently achieved

in order to justify terminating it.

LIBERAL DISSENT: Actual time under injunction was only 13 years. “The majority suggests that 13 years of desegregation was enough.” Majority fails to consider the potential of one-race schools as a “vestige” of former *de jure* segregation.

* CONTINUING IDEOLOGICAL DEBATE OVER THE SCOPE OF FEDERAL EQUITABLE RELIEF IN CONSTITUTIONAL LITIGATION INVOLVING STATE ACTORS – this debate occurs in constitutional litigation involving federal supervision of (1) state and local schools (including universities); (2) state prisons; (3) mental institutions, and the like

Freeman v. Pitts (US Sp Ct 1992) (Casebook, at 303-04, Note1) – approves a dist. ct.’s “incremental” or “gradual” dissolution of portions of its original desegregation decree – once court determines that certain portions of remedy have been achieved, court may dissolve only those portions, while continuing judicial supervision in other areas.

* “Terminate” versus “Vacate” an injunction

ISSUES RELATED TO AN APPEAL OF AN INJUNCTION:

In re O’Connell (Calif. 1925) – divorce proceedings, during which court enjoined husband by prohibiting him from “entering” home – turns out, husband had pre-existing possession of the home. He appeals injunction and obtains a stay of its enforcement after filing a bond. Thereafter, trial court held in contempt for remaining on property. Appellate court held that, if the injunction were “prohibitory,” then appeal/stay would not permit him to violate injunction; however, if the injunction were “mandatory,” then appeal/stay bond would truly stay the enforcement of it and D would not be held in contempt. Because injunction was really “mandatory” – since it required D to *vacate* his property – the appeal stayed the mandatory injunction and the district court had no power to hold the husband in contempt.

Super Tire Eng’g Co. v. McCorkle (US Sp Ct 1974) – N.J. welfare/unemployment agency, D, gave striking workers welfare benefits; employer, P, contended that NY violated Supremacy Clause by violating federal labor laws. Employer sought declaratory and injunctive relief in federal district court, suing NJ welfare agency. During course of litigation, union employees returned to work and stopped receiving welfare benefits. Dist. Ct. dismissed case as moot and denied preliminary injunction request. US Sp Ct held that, while injunctive relief moot, Declaratory Judgment Act not moot. “Capable of repetition, yet evading review” – another strike could happen. Moreover, sufficient “case and controversy” under Art. III.

“ANCILLARY” EQUITABLE REMEDIES – Masters, Receivers, Accounting

Accounting – in effect, an audit to determine amount of damages – “ancillary” to ultimate money judgment/decreed

Hurst v. Papierz (Ill. 1973) – receiver appointed to carry out “accounting” of fraud loss – trial court

erred by delegating the “accounting” to an CPA firm – trial court *itself* should have undertaken “accounting” with input/objections of parties in traditional adversarial manner.

Masters (“special master”) – third-party (typically a local member of the bar with some expertise in the area involved in the litigation) – can conduct evidentiary hearings, swear in and hear witnesses, issue subpoenas, make factual findings, recommend remedies, etc.. Special masters are involved in private and public law litigation; typically paid for by the parties or out of funds at issue in the litigation; masters issue “reports” of their findings, conclusions, and recommendations. See generally Fed. R. Civ. P. 53 -- masters can be used in jury and non-jury trials – in non-jury trials, masters factual findings subject to “clear error” when the district court reviews his report.

Receivers – appointed to manage property that is the *res* of a litigation (most common in bankruptcy cases)

CLASS NOTES – #7

Bill or Writ of “Quia Timet” – literally means “because he fears or apprehends” in Latin – equitable action seeking to prevent probable future injury, as opposed to action seeking to prevent/repair ongoing injury

Fletcher v. Bealey (English 1885) – P, paper manufacturer, who used a large quantity of river water to make bleacher paper “that had to be bleached as white as possible.” Ds, alkali manufacturers a few miles up river, produced a large quantity of refuse that released a green chemical gook, which they originally dumped in the river until they were enjoined by the local government. Thereafter, they carted the refuse to a location near river bank 1 ½ miles away from P.

P filed an equitable bill for “quia timet” relief, contending that “sooner or later” – over 40-50 years or so -- the green refuse will “find its way” into river and mess up P’s paper manufacturing process. P sought preventative injunction. Ds demurred on the ground that they would prevent the green liquid from making its way into P’s plant. Undisputed that P had sustained no injury at time bill filed.

Ct. sets forth two elements of quia timet action: (1) imminent danger; and (2) substantial damage. Also, really a third element: (3) P will not be able to reasonably protect himself from potential damage. Ct. here holds that, under the circumstances of this case, relief should be denied as “premature[ly]” sought. First, evidence did not show danger to be “imminent” enough. Second, because of potential of technological advances, ct. would not enter injunction now since at some point in future there may be a way of treating refuse to make it innocuous before it harms P.

Escrow Agents’ Fidelity Corp. v. Abelman (Calif. 1992) – Ps are surety and underwriter for surety; D is an escrow agent who embezzled \$4 million from Citi Escrow. Citi then filed claim for indemnity from P’s. In meantime, D filed for bankruptcy, yet bankruptcy court granted P’s motion for relief from automatic stay.

Calif. appellate ct. reaffirms that quia timet relief, although rarely used, is not “obsolete” in modern era. Ct. notes that statutory remedies have obviated need for such equitable relief. However, in context of fidelity/surety bond industry, quia timet still thrives → after underlying debt has become due, surety/guarantor who has reason to fear that the debtor/principal will not pay, may sue to compel debtor to pay debt, so long as it does not prejudice creditor. Note: this occurs when creditor does not seek to compel debtor to pay debt or perform act as required by contract. There is a remedy at law for surety – he can sue debtor to collect debt *after* surety has paid it to creditor – but this is generally “inadequate” when debtor has acted fraudulent in dissipating funds or has absconded with funds. Appellate court reverses trial court, which sustained defendant’s demurrer.

“Bills of Peace”:

Yuba Consolidated Gold Fields v. Kilkeary (9th Cir. 1953) – federal diversity action (“bill of peace”) filed by Yuba gold-mining co., a Maine corp. HUGE flood in California – affecting 1000s of homes

and businesses -- allegedly caused by Yuba's dredging operations on river. Evidence that massive litigation was mounting by flood victims against D. Numerous state court actions against D already filed. D disputes allegations that it was responsible for flood damage. D files this "bill of peace" seeking to consolidate all litigation into one federal lawsuit. D alleged that it had no adequate remedy at law because it was facing a "**multiplicity**" of **state lawsuits** – potentially 1000s – that would be impossible to defend. D alleges that all state actions involve common claims of law and fact.

9th Cir. first addresses notion of "**equity jurisdiction**" and discusses the difference between that type of "jurisdiction" and traditional subject matter jurisdiction. Ct. notes that federal "equity jurisdiction" limited to the types of English equitable actions available in Anglo-American jurisprudence as of 1789, unless modified by Congress. Ct. holds that a "bill of peace" was an available equitable remedy as of 1789. [Contrast Grupo Mexicano case.]

Ct. holds that there must be a "**common bond or interest between claimants**" in order for P's bill of peace to be granted. Ct. notes that there is a conflict in equity jurisprudence here – one set of decisions holds that there must be a legal "privity" between claimants [minority view], while a second set of decisions holds that there merely must be a common factual/legal basis for claimants' claims for relief [majority position]. Federal dist. ct. followed minority approach; 9th Cir. reverses.

However, 9th Cir. further holds that key is whether P has an "adequate remedy at law"? Because EQUITY IS DISCRETIONARY, court must consider totality of circumstances. Remember that P here is seeking to ENJOIN potentially 1000s of putative plaintiffs and force them to sue on a single federal equity action. Mere fact of multiplicity of lawsuits not enough to get equitable relief. Ct. must consider fact that plaintiffs' right to jury trial in state cases would be lost if case is removed and consolidated in federal court in equitable action. Also, ct. must consider adequacy of legal mechanisms for joinder/consolidation. 9th Cir. vacates and remands for reconsideration by federal dist. ct.

VARIOUS FEDERAL (AND EQUIVALENT STATE) PROCEDURAL DEVICES THAT MAY OBVIATE BILLS OF PEACE:

FED. R. CIV. P. 19 – Joinder & FED. R. CIV. P. 23 – Class Actions & FED. R. CIV. P. 42 – Consolidation

* **Second kind of bill of peace** – action to stop vexatious, repeatedly filing of frivolous lawsuits – U.S. Sp. Ct. does this all the time – See Casebook, at p. 333, Note 2

BILLS TO "QUIET TITLE" OR "REMOVE A CLOUD ON TITLE":

Wathen v. Brown (Md. 1981) – P, record holder of real estate. D had claimed ownership of P's property under claim of adverse possession. Shortly before 20-year period for adverse possession had run, P proactively filed an equitable bill to "quiet title." D answered and claimed ownership by adverse possession. Only proof of "possession" offered by P was proof of deed in P's name and plat. Trial court ruled for P.

On appeal, key issue is whether P had actual or “constructive” possession of property. If P did not have possession, then P had an adequate remedy at law, *i.e.*, action for ejectment. D asserts that mere proof of deed and plat don’t establish possession, actual or constructive. Appellate court agrees, holding that mere deed and plat don’t establish it. Constructive possession possible only with respect to vacant land. Here D apparently occupied land, so P’s remedy was either to prove that P was in actual possession (for equity action) or an action at law for ejectment. Appellate court vacates and remands for further proceedings.

* Note: difference between bill to quiet title (equitable remedy) and action at ejectment (legal remedy)

* Certain jurisdictions, usually by statute, have removed the “P’s possession” requirement

INTERPLEADER REMEDY:

State Farm v. Tashire (US Sp. Ct. 1967) – bus accident in California; truck hit it; injured passengers sued Greyhound Co., bus driver, truck driver, and truck owner in California state court. All individual D’s were Oregon residents. After state court action filed in California, State Farm – insurer of truck driver (“**stakeholder**”) – filed a federal interpleader action in federal district court in Oregon. 18 U.S.C. § 1335. State Farm submitted policy maximum (\$20K) into registry of court. State Farm also asserted that it was not liable because Clark was driving a truck that did not belong to him and, thus, fell outside ambit of the policy. All co-defendants and all prospective claimants joined in federal suit. Dist. Ct. issued order to show cause why all defendants should not be enjoined from prosecuting claims or cross-claims in any other state or federal court. Defendants responded by claiming that (1) policy did cover accident; and (2) interpleader action impermissible or inappropriate. Greyhound and bus driver eventually switched sides. Temporary injunction issued that required all “claimants” to file all claims against truck driver and ALL OTHER D’s in single action.

On interlocutory appeal, the 9th Cir. reversed. It held that, under Oregon law, suit against State Farm not permitted until judgment against truck driver happened. Interpleader could only happen at that point. Sp. Ct. first notes that Federal Interpleader statute is a “minimal diversity” statute (diversity among two or more claimants is enough). Ct. disagrees with 9th Cir.’s reasoning. Statute provided State Farm a remedy. However, Ct. also held that dist. ct.’s injunction was TOO BROAD – shouldn’t have covered all claimants and all co-defendants; should have been limited to actions by any claimants against truck driver. Interpleader statute not intended to be an all-encompassing “bill of peace.” Sp Ct. vacates injunction and remands for it to be modified.

*** Rationale of interpleader remedy is similar to second type of bill of quia timet or bill of peace – *i.e.*, the avoid multiplicitous litigations regarding same issue.

* Non-statutory interpleader – Fed. R. Civ. P. 22

* “Interpleader” vs. “Impleader” (third-party claim by defendant in a suit claiming that third party is liable to defendant for all or part of plaintiff’s claim)

DECLARATORY JUDGMENTS:

-“coercive” judgment (executory process follows) vs. “declaratory” judgment (executory process need not follow) —>both have *res judicata* effect in subsequent case

-28 U.S.C. § 2201 & Fed. R. Civ. P. 57:

- * no need to request other relief; plaintiff may, however, seek alternative & additional remedies
- * right to jury trial preserved where it would otherwise be applicable

Nashville, Chattanooga & St. Louis Railway v. Wallace (US Sp. Ct. 1933) – state declaratory judgment action under Tennessee law in which federal constitutional claims asserted – dormant commerce clause/E.P. challenge to Tennessee excise gas tax. Issue on appeal is whether there is a “Case or Controversy” under Art. III. Sp. Ct. held that there was a “**justiciable controversy**.” Real-live consequences here (“real and substantial controversy”); not “abstract” or advisory opinion sought.

* No need to allege “irreparable injury” in order to obtain declaratory judgment (contrast injunction requirement)

SPECIFIC PERFORMANCE OF CONTRACTS:

* equitable remedy (not remedy “at law”)

* traditionally, specific performance is a remedy awarded in lieu of money damages – not an optional remedy – only awarded if money damages inadequate remedy at law —> certain exceptions to this general rule (discussed below)

Specific Performance of Breached Contracts for Personal Property:

Eastern Rolling Mill Co. v. Michlovitz (Md. 1929) – agreement for D (seller) to supply P (buyer) with scrap metal for a period of five years. According to contract, prices to be set every 3 months based on prices listed in local trade periodical. D’s co. president died, and new president rescinded the contract. P sought specific performance rather than damages; trial court granted s.p. Appellate court held that specific performance was appropriate here. Although it recognized general rule that contracts for sale of non-unique chattels were generally not specifically enforceable, court recognized **exception for long-term “installment” contracts**. When such a long-term contract is breached, damages are speculative and conjectural.

General Securities Corp. v. Welton (Ala. 1931) (Casebook, at p. 355, Note 3) – breach of contract to sell shares in a closely-held corp. (not sold on a stock exchange) resulted in specific performance – impossible to determine damages (market value) with accuracy

* **sec. 2-716, UCC, on Specific Performance:** “unique” goods “or in other proper circumstances,” including inability of buyer to cover when good “identified” in contract [replevin] —> a “more liberal attitude” toward specific performance in UCC – broad definition of “unique” goods (in terms of whether there is a commercially-feasible ability to “cover”)

Heilman v. Union Canal Co. (Pa. 1860) (Casebook, at 356-66, Note 5) – mere fact that D has become insolvent (and, thus, money damages can’t be covered) is not **by itself** a reason to grant specific performance. An important factor, but not by itself dispositive.

Specific Performance of Land Sales Contracts:

Kitchen v. Herring (N.C. 1851) – P (buyer of land); D (seller). After land sales contract executed by parties, P took possession and started cutting timber. D, however, didn’t deed the land to P but to another person. P then sought specific performance of contract. Ct. grants it, following well-established proposition that **specific realty** identified in contract is virtually always considered “unique.” Accordingly, money damages considered inadequate remedy at law. Damages also considered speculative here.

* presumption of “uniqueness” applies to both commercial and residential properties

* SPECIFIC PERFORMANCE OF LAND SALES CONTRACTS IS A TWO-WAY STREET: Sellers may sue to make buyer pay agreed price (since law considers it difficult for seller to prove with “reasonable certainty” the difference between market value and contract price)

REAL ESTATE LEASES:

Van Wagner Advertising v. S & M Enterprises (NY 1986) – 3-year **lease** of realty – predecessor of D leased billboard space on a building to P; when D took over, D rescinded the lease under a provision of lease giving successor of lessor the right to cancel lease on 60 days written notice of sale of building to 3d party. P sued for specific performance and damages. Trial court held that D wrongly terminated lease but denied specific performance and, instead, awarded damages. On appeal, the court held that, unlike breach of a **land sales contract**, specific performance is **not** automatically awarded when there is a breach of a **real estate lease**. Although property here “unique” in terms of its location and physical attributes, that is not key here. What really matters is **whether a reasonable valuation is possible**. Court held that, because money damages could be reasonably ascertained here – by looking at similar leases -- the trial court’s refusal to decree specific performance was correct.

* **Restatement (2d) Contracts**, sec. 360: mentions **three factors** in considering whether to award specific performance: (1) difficulty in proving damages with “reasonable certainty”; (2) difficulty in “covering” with adequate substitute; and (3) likelihood that damages can be collected.

Rubinstein v. Rubinstein (NY 1968) – agreement between two cousins (Leo and Henry) over division of jointly held commercial real estate. Contract had a \$5,000 liquidated damages clause. Leo breached agreement, and Henry sued for specific performance. Leo answered that Henry had an adequate remedy at law, i.e., the \$5,000 in liquidated damages. Ct. held that a liquidated damages clause will not, in and of itself, preclude specific performance as a remedy *unless the contract specifically so provides*. Here it did not, so court properly granted specific performance. * **plaintiff has a “choice of remedies” – may “elect” one over the other**

Assignment of Contracts (rights vs. duties):

Langel v. Betz (NY 1928) (Roscoe Pound, J. – joined by, *inter alia*, Cardozo & Andrews) – P (seller) made a land sales contract with non-parties (buyers) for sale of certain real estate. Non-parties then assigned their right to buy realty to another non-party, who in turn assigned to D. The assignments contained no “delegation” of the assignor’s “duties of performance.” D then refused to close on property on closing date. P then sued for specific performance by D. Ct. held that, because assignments did not include delegation of duties (in addition to assignment of rights), specific performance would NOT be decreed.

* Inconsistent with Restatement (1st) and UCC approach to express assignment/implied delegation

* **Restatement (2d) Contracts sec. 328**: presumption of implied delegation of duties when there is an “assignment” of rights, save in case of assignment of land sales contract (“in deference to” Langel). Prof. Farnsworth refers to Langel as a “notorious case,” yet rationale not all that crazy

since only land sales contracts are subject to automatic specific performance (as opposed to contracts for sales of goods)

Epstein v. Gluckin (NY 1922) (Casebook, at p. 369, Note 2) – when assignee/buyer sues seller for specific performance, then assignee is deemed to assume duties of assignor

Weinberger v. Van Hassen (NY 1932) (Note 3) – 3rd party beneficiary may sue for specific performance of agreement entered into by another party for his benefit

DOCTRINE OF EQUITABLE CONVERSION:

Panushka v. Panushka (Or. 1960) –Equitable maxim “equity considers as done that which ought to be done” – if land sales contract is executory and title has not passed, the purchaser is the “beneficial” or “equitable” owner. If, prior to closing, vendor dies, then his interest in purchase money passes as personalty to estate; vendee’s equitable interest in land passes to his estate.

Walker & Trenholm v. Kee (S.C. 1881) – EFFECT OF ASSIGNMENT OF CONTRACT RIGHTS ON EQUITABLE CONVERSION -- complex facts – series of assignments of promissory notes and land; notes originally given as consideration in land sales contract. Vendor assigned land to assignees, subject to agreement with Key; assignees of notes, because Key was insolvent, then sued for specific performance of the land sales contract – i.e., to sell land to pay debt owed to them. Ct. holds that in effect notes are a lien on land and, thus, assignees of notes have rights to sue for specific performance of land sales contract (i.e., right to require payment) because of doctrine of equitable conversion.

Taylor v. Kelly (NC 1857) – P, buyer of land; D, seller of land. After land sales contract executed but before closing, D sells to a third party. P sues for land (having joined 3rd party as co-D since he had notice of P’s “equity” in land). ALTERNATIVELY, P sues for purchase price of land paid to D by co-D. Ct. holds that D was, in effect, a “trustee” of land, so that any profit made on land sale to co-D, is properly due to P – “constructive trust” concept.

Colby v. Colby (NY 1894) (Casebook, at pp. 375-76, Note 1) – in exchange for wife’s agreement of marriage, husband promised to leave her land to her in his will. After marriage, husband’s relatives talked him into changing will and writing wife out of it and leaving land to relatives. After husband died, wife sued relatives for land. Ct. awarded specific performance to wife. Species of equitable conversion involving third party.

QUESTION: What about vendee’s transfer to *bona fide* purchaser without notice? According to the majority rule of courts that have addressed the issue, BFPWN would prevail. Difference between BFPFV and “gratuitous donee” (such as beneficiary of a will).

In re Boyle’s Estate (Iowa 1912) – equitable conversion does not give a vendee in an entirely executory land sales contract the right to rents under an existing lease if, under the terms of the contract, the vendee did not have a right to possession of the land until closing

* of course, actual conveyance of land grants the vendee a right to collect all unaccrued rents

Moses v. Johnson (Ala. 1890) (Casebook, at p. 377-78, Note) – Ct. states that a vendor out-of-possession of land but before conveyance of title following execution of installment land sales contract is tantamount to mortgagee → facts: after land sales contract executed, but before title passed, vendee, D, took possession; vendee (in effect, mortgagor) started cutting timber from land. P, vendor/mortgagee, sued for injunction against D's cutting timber on ground that, sole security for what was in effect a mortgage was the land with timber on it and that removal of timber materially impaired security. Ct. agrees that injunction is appropriate under such circumstances.

Skelly Oil v. Ashmore (Mo. 1963) – executory land sales contract for both land and buildings; before closing building burned down, and vendor received \$10,000 in insurance proceeds on burned down building; admittedly, vendee intended to demolish building once he took possession – **contract entirely silent** regarding assumption of risk & duty to insure. Vendee sued for specific performance with \$10,000 abatement of purchase price

Ct. notes multiple approaches by courts on assignment of risk in these types of cases (p. 380) – Relying on a Columbia law review article by (future Supreme Court Chief Justice) Harlan Fiske Stone, ct. rejects traditional rule (that risk of loss always on vendee under “equitable conversion” doctrine) and, instead, purports to adopt the “Massachusetts rule,” whereby risk of loss ordinarily on vendor, which permits vendee to sue for specific performance with abatement in purchase price caused by fire.

Strong Dissent (4-3): “windfall” of \$10K to vendee – agrees that Massachusetts rule applies, but contends that majority has reverted back to traditional rule by giving \$10K to vendor

Dixon v. Salvation Army (Cal. 1983) – vendor, P, agreed to sell real estate to purchaser, D. Before closing or D's possession, part of property burned down without fault of either party. Building significantly under-insured. Trial court awarded vendee specific performance with abatement by purchase price in amount of loss caused by fire. Appeals court applies **Uniform Vendor & Purchaser Act's** “default” rule (since contract silent) – vendor can't specifically enforce contract (i.e., vendor assumes risk), unless vendee has taken possession or title has passed to vendee (and vendee has not assumed possession). Ct. holds that equitable thing to do is, because “material” part of property destroyed, contract abrogated (any purchase money refunded) and parties put back in negotiating position prior to contract; free to negotiate new terms.

Dissent: risk should be on seller in commercial setting – seller should have insured for this foreseeable loss – trial court's judgment should be affirmed

* **Uniform Land Transactions Act** (Casebook, at p. 391-92): default rule – in case of material loss prior to closing, gives vendee choice of all potential remedies; if loss immaterial, buyer must accept real estate with abatement (measured in decrease in fair market value or by insurance proceeds paid) -- **alternative measures of damages for abatement**

Rudd v. Lascelles (English 1900) (Casebook, at p. 392, Note 2) – where vendor told vendee that she

was ignorant of the quality of her title, vendee cannot sue for specific performance with abatement based on reduced value based on unknown restrictive covenants discovered prior to closing – vendee must pay contract price

Radel v. 134 W. 25th St. Building Corp. (NY 1928) (Note 3) – vendor made honest mistake in telling vendee how much rental value of property was; prior to closing, vendee discovered that rental value was much less than that represented by vendor; vendee sued for specific performance with abatement in purchase price; appellate court, 2-1, held that abatement not appropriate because no allegation that vendor had “scienter” or that vendee had relied to his detriment on vendor’s incorrect representation – ***majority draws distinction between misrepresentations in title and misrepresentations about other aspects of property (e.g., rental value); dissent says majority’s distinction is illogical in modern commercial world***

Barnes v. Wood (English 1869) (Note 4) – ***vendor’s honest mistake about defects in title*** will result in specific performance with abatement in suit by vendee

Billy Williams Builders & Developers v. Hillerich (Ky 1969) – P, buyer of land and home to be constructed on it; D, residential developer. P sued for both specific performance (i.e., conveyance of property) ***and*** damages (for defects in house and for undue delay in construction of house). Trial court granted both type of remedies, equitable and legal. Key issue on appeal was whether both types of damages can be awarded. Appellate court holds both are proper here. Not different from specific performance with abatement of purchase price. Not “inconsistent” remedies requiring plaintiff to “elect” remedies. Damages were different remedy from specific performance – each remedy concerned different right-violations.

Lane v. Newdigate (English 1804) – P leased land from D, with “covenant” for D to supply water to P from D’s land; also, contract provided that D would not unreasonably use land to interfere with P’s need for water. D did just that, by physically altering water supply mechanisms (e.g., locks, drainages, etc.) P sought injunction (in effect specific enforcement of contract) that required P to repair and restore his land to *status quo ante*. Ct. granted injunction.

Jones v. Parker (Mass. 1895) (Holmes, J.)– real estate rental agreement, including “covenant” for D to supply P with sufficient light and heat. Lessee sued for specific performance of covenant in lease. Court grants it, even though it will require “some building” by lessor.

City Stores Co. v. Ammerman (D.C. 1967) – agreement between shopping center developer and store, whereby if store helped developer get property re-zoned, then developer would lease space to store on terms equal to other lessees (i.e., long term commercial lease). Breach by developer after store had fully performed. Suit for specific performance. Developer countered that specific performance improper because contract was not definite to enforce – lacked too many essential terms (including rate of rents and amount of space to be leased). Ct. grants specific performance. Rejects argument that open terms bar specific performance. Open terms subject to “good faith negotiation” and can be established by looking at terms of other store leases. Money damages inadequate remedy – too speculative in this long-term lease situation. Ct. also holds that mere fact that D must construct building (for the store) doesn’t bar specific enforcement. Notes split among courts on this issue;

traditional rule is that equity court won't supervise construction. Ct. rejects argument that too much judicial supervision would be required in overseeing the construction of building and parties' negotiation of lease terms. [cf. constitutional litigation cases – school desegregation, etc. – where incredible judicial supervision goes on as part of the remedy]

* Fed. R. Civ. P. 70 – permits federal district court in equity to appoint a third party to carry out and act that a disobedient defendant refuses to do – cf. Writs of Assistance, Writ of Sequestration, etc.

De Rivanfinoli v. Corsetti (NY 1883) – agreement between P theatre manager and D opera singer (“to sing, gesticulate, and recite”) – 8-mo. performance contract, including negative covenant that D would not perform elsewhere. P alleged that D had entered into another opera contract and was “about to leave” to go to Cuba; P also alleged that D could not be replaced without undue expense and delay. Trial court decreed specific enforcement of singing contract and committed D to jail under a writ of “ne exeat.” Appellate court vacates ne exeat writ and refuses to grant injunction because time for performance of contract had not yet occurred – denies “quia timet” relief -- equity bill “prematurely” filed.

* cf. Title VII statutory remedies, which include decrees requiring employer to rehire fired employee

Lumley v. Wagner (English 1852) – famous English opera case – same basic facts as preceding case; this time, trial court grants “negative injunction” -- defendant singer not permitted to perform contract with other company (co-D in case), i.e., specific performance of negative covenant in contract. Ct. states that it has no power to enter specific performance decree requiring D to sing for P (equivalent to involuntary servitude).

[subsequent case of Lumley v. Gye – after opera singer refused to sing for P, P brought legal action for money damages – P was awarded only nominal damages – good example of where legal remedy is inadequate]

Philadelphia Ball Club v. Lajoie (Pa. 1902) – “exclusivity clause” in pro ball player’s contract; he sought to break contract by playing for cross-town rival. Pa. Sp. Ct. enforced exclusivity clause – held that, in order to do so, P need not show that D’s services would be “impossible” to replace – only that D’s services are “unique” in a relative sense. Court states it has no power to “affirmatively” specifically enforce contract, just as in Lumley.

* courts will sometimes *imply* exclusivity clauses in employment contracts when that is clear what the parties intended, even if such an express provision left out of contract

CLASS NOTES – # 9

* EQUITABLE CONVERSION DOCTRINE UNDER TEXAS LAW: see, e.g. Guzman v. Acuna, 653 S.W.2d 315 (Ct. App. – San Antonio 1983) (writ dismissed) (citing cases)

Ticor Title Ins. Corp. v. Cohen (2d Cir. 1999) – P leading NY title ins. co. sued D, a former co. executive who was in charge of several major accounts. Covenant was essential to employment contract. Evidence showed that D's own attorney played a role in drafting the covenant. D was a highly-paid, powerful employee (making more than \$1 mil. with a generous expense account). Ticor's leading competitor lured D away (with huge salary and \$2 mil. signing bonus, and an agreement to indemnify D from breaching covenant!). Before D jumped ship, he started making efforts to take business with him. P sought to enforce non-competition covenant in his employment contract. Dist. ct. granted TRO, prelim. injunction, and ultimately a permanent injunction, which barred D from working in NY title ins. business and from appropriating P's "corporate opportunities" for six months, as per covenant's terms. Dist. ct. not only rested its decision on breach of contract but also found that D had exploited confidential information and breached his fiduciary duty.

Second Cir. affirmed. [NY law applied here – diversity case] Ct. held that, because D's services were sufficiently **"unique,"** covenant would be specifically enforced. Nature of title ins. co. salesperson's business is "personal relationship" with real estate law firms. Standard in reviewing injunction – abuse-of-discretion. Two key criteria for enforcement of restrictive covenant/exclusivity clause: (1) irreparable or "irremediable" harm, and (2) inadequate remedy at law. With respect to inadequate remedy at law and irreparable harm issues, court holds that D's breach "would produce an indeterminate amount of [lost] business." Also, ct. notes NY cases that "assume" an irreparable injury to former employers in covenant-not-to-compete cases.

* Leading old case upholding covenants not to compete – Mitchell v. Reynolds (English 1711) – as a general matter, such covenants **not** void as a restraint of trade, so long as "reasonable"

2nd Cir. notes legal standard applicable to judging covenants not to compete: they must be "reasonable" both with respect to: **(1) duration and (2) geography** – only "reasonable" restraints of trade permitted; in instant case, court holds, both duration and geographical restrictions are "reasonable" (180 days and single state). 2nd Cir. also held that, in addition to being "reasonable," a covenant not to compete should be enforced where it (1) prevents release of confidential information gained during former employment; (2) prevents release of a "trade secret"; or (3) where former employee's personal services are deemed **"special" or "unique" or "extraordinary"**

* By "unique" in terms of personal services, ct. does not mean Picasso, Beethoven, or Einstein – rather, it means something less demanding – "special" or "extraordinary" are more apt descriptions; former employer need not have been employer's only "star" or *sine qua non* of successful business operation. 2nd Cir. held that D's "personal relationship" with clients was "unique" enough to enforce covenant – nature of business is salesperson's personal relationship with clients

* In "balancing equities," ct. also noted that D would not go hungry because of enforcement of

covenant – i.e., indemnification from new employer. Reality: court does not like the money-grubbing, opportunistic defendant.

EXAMPLES of cases where former employees' services not found to be "unique" (Casebook, at pp. 419-20) – salesmen of standard products/services; printer of fabric designs; theatrical booking agent; beauty parlor employee; skilled watch artisan

Rogers v. Runfola & Assoc. (Ohio 1991): restrictive covenant limited former employees from engaging in court reporting business in Franklin County, Ohio (in which Columbus lies) for two years and from "soliciting or diverting" clients of former employer *forever*. Issue is whether non-competition covenant in ct. reporters' employment contracts should be specifically enforced. Ct. notes applicable legal test to apply: (1) covenant that imposes "unreasonable restrictions" on former employee will nonetheless be enforced "to the extent necessary to protect an employer's legitimate interests"; and (2) a covenant is "reasonable" if the "restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public" —> BASIC RULE HERE: LEAST RESTRICTIVE AS NECESSARY TO PROTECT EMPLOYER'S LEGITIMATE INTERESTS

* ***other considerations***: temporal and geographical scope; protection of confidential info.; whether covenant seeks to restrain "ordinary" competition; whether benefit to employer would be "disproportionate" to employee (balancing hardships); whether covenant leaves employee without a means of support; whether former employees developed their skills when working for employer, etc. —> ***courts may judicially re-write covenants to make them "reasonable"*** ("blue-pencil" doctrine)

Ct. holds that covenant is overbroad, so orders it modified as follows: one year duration from date of judgment (cuts in half) and only within city limits of Columbus. Ct. also drastically limits the non-solicitation provision (regarding employer's clients) to one year.

* Ct. REMANDS FOR DAMAGES ISSUE – "what damages, if any, appellees have caused Runfola by disregarding the covenant not to compete, as modified, by this court"

QUESTION: why did court award both specific performance ***and*** money damages? Another exception to general rule here. Damages are a remedy for past harm caused to P, and specific enforcement remedy is a prospective remedy. Remedies don't overlap.

Purchasing Associates, Inc. v. Weitz (NY 1963) – enforcement of covenants not to compete in context of sale of business concern [versus former employee situation] —> necessary to prevent seller from "stealing" away the very "good will" that was purchased by the buyer of the business; yet still subject to "reasonableness" requirement

* CTS GENERALLY LESS WILLING TO ENFORCE COVENANTS IN FORMER EMPLOYEE CONTEXT THAN IN SALE-OF-BUSINESS CONTEXT – primary rationale: don't want to take away a person's livelihood

* ANOMALY IN THE LAW: exception for non-competition covenants applicable to attorneys, “except [for] an agreement concerning benefits after retirement” – Model Rule of Professional Conduct, Rule 5.6 —> this is an especially anomalous exception because courts generally tends to be more willing to enforce such restrictions on members of the “learned professions”

Smith, Bell & Hauck v. Cullins (Vt. 1962) (Casebook, at 425, Note 3) – holds that non-competition covenant is non-assignable to successor employer

NON-COMPETITION COVENANT VS. NON-SOLICITATION COVENANTS:

BDO Seidman v. Hirshberg (NY 1999) – P is a national accounting firm; D former accountant with P’s Buffalo office. Parties entered into a “reimbursement clause,” whereby D would compensate P if D worked for “ANY” client of P’s Buffalo office within 18 months of D leaving P’s employ. Contract specifically recognized that P and D were in a “fiduciary relationship.” Lower courts refused to enforce covenant as overbroad. Court of Appeals’ holding: applies same basis test as non-competition (1) must not be broader than necessary to protect employer’s “legitimate interests”; (2) can’t impose an undue hardship on employee; and (3) can’t be injurious to public. In determining these factors, ct. also considers TIME and SPACE limitations under “reasonableness” standard. Also, protection of confidential information (e.g., confidential client list or trade secret) is highly relevant factor. Ct. holds that covenant, as written, is OVERBROAD. D was not a “unique” employee in terms of his services; his main asset was his ability to attract clients. No evidence that D used confidential information to obtain clients of P. Thus, the “any client” restriction in covenant is too broad. Can’t enforce it to extent that it limits D from working for former P clients with whom he had no relationship when he worked for P. Ct. holds that it has power to RE-WRITE particular clause – holds that illegal portion is severable and doesn’t void the entire provision. Ct. otherwise upholds provision. Reasonable in time and space aspects (18 months, Buffalo). COURT MODIFIES COVENANT and remands for damages determination (in particular, remands for determination whether 150% damages provision, in essence a liquidated damages provision, is reasonable).

Peat Marwick Main & Co. v. Haass (Tex. 1991) (Casebook, at 433, Note 1) – in dealing with a similar non-solicitation covenant, Texas Supreme Court held that covenant was overbroad, but refused to re-write provision and partially enforce it. * Note: majority never even mentions issue of “**blue penciling**” – Judge Cornyn’s dissent suggests that should have been done

Post v. Merrill Lynch, Pierce, Fenner & Smith (NY 1979) – at issue is enforceability of “**forfeiture**” **provision** of employment contract that stated that, if former employer competed with employer *after* leaving (voluntarily or involuntarily), then former employee would lose his or her right in company pension plan. Here, employees were fired without cause. Ct. held that forfeiture provision was unenforceable in case where employee involuntarily discharged *without cause*. Two points: (1) “strong public policy” against forfeiture of retirement benefits (e.g., ERISA – Employee Retirement Income Security Act of 1974); and (2) employer’s unilateral action here destroyed the “mutuality of obligation” in contract (and, thus, rendered contract enforceable as a matter of contract law). Ct. holds that such a provision is “UNCONSCIONABLE.”

ARBITRATION CONTRACTS:

Grayson-Robinson Stores, Inc. v. Iris Constr. Corp. (NY 1960) – P store vs. D shopping center developer. After written contract executed, D demanded that P agree to a higher rent in order to complete store space for P; parties went to arbitration pursuant to terms of contract, which expressly gave the arbitrator the power to order specific performance as a remedy. After arbitration, arbitrator ordered specific performance and prevailing party sought to have courts “confirm” the arbitrator’s award. Ct. agrees to enforce arbitrator’s award of specific performance, noting “the trend [in the law] is toward specific performance.” Ct. rejects D’s argument that specific performance would be “impracticable” because of need for “prolonged judicial supervision” [cf. City Stores v. Ammerman, supra] – most courts reject that traditional reason for not awarding specific performance – ct notes that, even if a chancellor might have refused to exercise traditional equitable discretion here, ct. must do it here since arbitrator awarded it and his decision was not an abuse of discretion

4-3 DISSENT: arbitration can’t supplement independent obligation of judiciary to determine whether equitable relief appropriate

Sprinzen v. Nomberg (NY 1979) – P is a labor union; D is a former employee of union. Employment contract contained a restrictive covenant that provided that D would not work for another union for 5 years in New York state and surrounding states. Pursuant to contract, dispute went to arbitration. Arbitrator enforced restrictive covenant as written. P then sought to have courts “confirm” arbitration award. Ct. held that, although it might not enforce covenant as written if case had originally been decided in trial court, it would defer to arbitrator’s award of specific performance since it could not be deemed “unreasonable” in the broader sense (as opposed to “unreasonable” under restrictive covenant caselaw). Ct. notes that arbitrators are not bound by principles of substantive law or procedural law that govern courts. Cts. apply a general “policy of noninterference” → “wide latitude afforded to arbitrators.” Such a covenant not “void” as a violation of “public policy.” Thus, ct. enforces arbitrator’s award of specific performance.

*** MODERN TREND TO ARBITRATION: Uniform Arbitration Act & Federal Arbitration Act – cts. will almost always specifically enforce agreements to arbitrate**

* General “Presumption of Arbitrability” – Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp. (1983) (Casebook, at p. 443, Note 3) – exceptions for particular areas where intent of parties must be crystal clear (e.g., union-negotiated waiver of right to go to court on ADA or other employment discrimination claim – right to seek redress from courts considered too important to presume arbitrability)

* However, there is no a presumption that the “scope of arbitration” is to be decided by arbitrator – the parties must be “clear and unmistakable” that the arbitrator is permitted to decide the scope of arbitrability (“arbitration of arbitrability”) – see Carson v. Giant Food, Inc. (4th Cir. 1999)

* Casebook should have just cited First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995), which says the same thing

* With respect to virtually any arbitration issue (save things totally contrary to public policy), the key issue is the *parties' intent regarding arbitration* (the foregoing cases only deal with judicial presumptions or “default” rules; parties may almost always “contract around” default rules unless it would violate “public policy”)

CLASS NOTES – #10

* Reminder: equitable conversion is relevant here only as it relates to available remedies (in terms of specific performance with or without abatement in purchase price)

NEW MATERIAL: EQUITABLE RELIEF AGAINST TORTIOUS INTERFERENCE WITH REAL AND PERSONAL PROPERTY (Chpt. 7)

* equity in contract context vs. equity in tort context – traditionally, cts. more reluctant to grant equitable relief in tort cases – started in waste, trespass & nuisance cases

* although theoretically in a tort case, in order to obtain an injunction a P needs to show an inadequate remedy at law (usually money damages), cts. regularly award injunction and money damages in same case even if two remedies overlap (contrast specific performance remedy)

Waste cases:

Earl Bathurst v. Burden (English 1786) – ct. enjoins defendant/lessee from committing “waste” (*i.e.*, damage to fishing pond) on plaintiff/lessor’s land

Question: why inadequate remedy at law here? Because it involved “unique” real estate? Answer is part “unique” property, but better answer is that waste that impairs long-term profitability of property results in speculative damages.

Doherty v. Allman (English 1878) – P leased lands to D in late 1700s/early 1800s for agricultural purposes – D planned on converting it to residential use – D sued for an injunction. Ct. denied it on ground that it was “technical” or “ameliorative waste,” *i.e.*, it improve value of land

Travelers Ins. v. 633 Third Assocs (2d Cir. 1994) – P lender/mortgagee; D borrower/mortgagor. D willfully failed to pay property taxes. P sought injunction, contending that D’s failure to pay property taxes constituted “waste.” P sought to enjoin D from distributing its cash assets. Two kinds of waste under NY law: (1) traditional waste, whereby mortgagor impairs long-term value of land; (2) mortgagor impairs the mortgage [rationale: to prevent mortgagor from avoiding first type of waste action by simply paying third-party to keep property in repair, resulting in a mechanic’s lien on the property, which impairs the value of the mortgage].

Issue: does action in equity lie for mortgagor’s willful failure to pay property taxes, which causes “financial” harm to property? Yes, so long as (1) “intentional or fraudulent” and (2) it impairs the value of the collateral (*i.e.*, the property). An intentional failure to pay property taxes does impair security because a tax lien attaches to property, which mortgagee must pay off (including accrued interest) when he forecloses.

Dissent: notes that state courts are split on this particular “costructive” waste issue

* English “Statute of Gloucester” – treble damages for waste in addition to equitable relief – many American states have a statute modeled after this English statute. (Texas appears not to have such a statutory or common-law remedy for treble damages in a waste case.)

Trespass cases:

Wheelock v. Noonan (NY 1888) – P gave D a license to place a “few rocks for a short time” on P’s land. D proceeded to place “huge quantities of rocks” on P’s land. D failed to remove them when P requested. Lower court found trespass and entered mandatory injunction requiring D to remove rocks. Appellate court affirms. Ct. finds inadequate remedy at law because of “continuous” nature of trespass – *i.e.*, would require repeated legal trespass actions. Continuous trespasses remediable in equity by an injunction to avoid multiplicity of lawsuits by P.

* Difference between trespass & “private nuisance” causes of action – trespass involves interference with plaintiff’s *possession* of land; private nuisance involves interference with plaintiff’s *use and enjoyment* of his land – some cases involve both —> in Martin v. Reynolds Metals Co. (Ore. 1959), the court held that “invasion” of P’s land by invisible flouride chemical compounds constituted a direct trespass (so as to permit trespass S-O-L to apply rather than shorter nuisance S-O-L) – nice discussion of modern science’s relation to tort remedies law ($E=mc^2$)

* legal action for “ejectment” – P must have legal title to land to maintain a legal action for ejectment; equitable action may lie if P has beneficial title

Hirschberg v. Flusser (NJ 1917) – D built basement foundation/wall that encroached on P’s property line by 9". P’s action at law not adequate because sheriff would not execute ejectment judgment because to do so would result in trespass on D’s property. P thus sues in equity for an injunction to require D to remove encroachment. Ct. holds that, so long as P has legal title to property, ct. has discretion to grant injunction in “continuous trespass” case [ejectment is an inadequate remedy at law]. Ct. dismisses demurrer.

Lucy Webb Hayes Nat’l Training School v. Geoghegan (D. D.C. 1967) – P hospital; D patient who refused to leave (**co-D is her husband**). Husband didn’t want to move wife to a nursing home. Hospital sued for an injunction to require D to leave. Ct. finds legal action for trespass (*i.e.*, money damages) inadequate remedy at law. “Continuous” trespass. Ct. considers ejectment to be inadequate for reasons not really explained (presumably ct doesn’t want to make the sheriff forcibly remove her). This way ct. can hold patient’s husband (co-D) in contempt if he doesn’t remove her.

Peters v. Archambault (Mass. 1972) – D’s land significantly encroached on P’s land (9% of P’s lot). Two oceanfront homeowners. D’s predecessor-in-title built encroaching house. General rule is that, when “significant” encroachment, even if innocent or negligent, a mandatory injunction will issue, even if it causes great expense to D. “Rare” exception if *de minimis* encroachment and mandatory injunction would cause “greatly disproportionate” harm to D. In this case, ct. orders mandatory injunction because encroachment “substantial.”

DISSENT: “oppressive,” “disproportionate” remedy here – encroachment was both “innocent” and

in “full view” for 20 years [no adverse possession because land was “registered”] – this will cause destruction of D’s house. Dissent contends that there is an “adequate remedy at law” – court could order P to agree to relocate boundary line in exchange for money damages

* Restatement (2d) Torts, § 941 – “Relative Hardship/Balancing Equities” – when a tort occurs and inadequate remedy at law, injunction not to be awarded as a matter of course – rather, court must consider hardship on D that an injunction would cause and “balance equities”

Nuisances:

State of Tennessee v. Feezell (Tenn. 1966) – action by property owners to enjoin construction of a crematory in a “rural/residential area” as a nuisance – alleged injury would be “psychic” discomfort/depression and lowering of property values; D counters that the P’s suit is premature since crematory not yet built. Ct. holds that, as a general rule, an “anticipatory injunction” [cf. quia timet] is not proper unless it is a “nuisance per se” or a “nuisance at law,” which is defined as a nuisance “at all times and under all circumstances” regardless of the location or surroundings. Exception is if injury is “imminent and certain” [cf. quia timet].

* nuisance at law (per se) vs. nuisance in fact [cf. slander per se]

Ct. states that nuisance per se action based on a funeral parlor (and presumably a crematory) in a “purely residential neighborhood” is viable based solely on “psychic” harm/depressed property values – however, here evidence in record did not show a “purely” residential injury – INJUNCTION DENIED

Campbell v. Seaman (NY 1876) – D’s brickyard kiln (sulphuric gas) killed neighbor P’s plants/trees. General rule is that property owners are free to use their property as they wish so long as they cause “no unnecessary damage or annoyance to his neighbor” in his use of the property – that is, “reasonable” use of land only. What is “reasonable” in this regard is determined on a case-by-case basis that looks to the totality of the circumstances. A particular use of property may be a nuisance under some circumstances and in some locales but not in others. * There must be “A TANGIBLE AND APPRECIABLE INJURY” to neighbor

* Ct. finds irreparable damage here – “continuous” nuisance (even if only “occasional”) (cf. continuous trespass) and money damages not adequate remedy at law

* Ct. rejects argument that P’s claim fails because the P bought land and built house after brick yard – (1) irrelevant in any event; (2) not as if brickyard was a continuous operation – sporadic operation over the years

* Ct. also rejects estoppel (not 20 years, not detrimental reliance by D)

* no “prescriptive” right by D (not 20 continuous years)

Tushbant v. Greenfield’s Inc. (Mich. 1944) – P store; D adjacent restaurant. P’s store entrance blocked by D’s customers who lined up outside. Trial court entered injunction requiring D to line up customers “with not more than 2 standing abreast of one another.” Ct. affirms but MODIFIES

the terms of injunction (D's employee can "supervise" customers to make sure that they don't block entrance to P's store).

DISSENT: let police deal with it – the civil law provides no remedy for it

Danielson v. Local 275 (2d Cir. 1973) – NLRA case. Regional Director of NLRB moved for an injunction against union members for unfair labor practices – i.e., picketing with prior NLRB permission. Union trying to get apartment complex owner to sign collective bargaining agreement without pursuing NLRA procedures. Dist. ct. found unfair labor practices by union but denied injunction because ct. found no "irreparable injury." Dist. ct. applied "general equitable principles." On appeal, threshold issue is whether statutory remedy – sec. 10(l) of NLRA – supplants common law here. 2nd Cir. holds that language of statute – i.e., that injunction should issue when it is "just and proper" – sufficiently incorporates common-law equitable principles. [Cf. TVA Hill – statutory displacement of traditional equitable principles]. In any event, court finds that there was irreparable injury in this case. Dist. ct. erroneously believed that a total work stoppage was required; substantial delays caused by unfair labor practice was enough for irreparable harm.

* Ct. equates inadequate remedy at law (money damages) with irreparable harm [cf. Ticor] – ct. concludes that money damages would be difficult to determine based on D's unfair labor practices here – INJUNCTION ORDERED

Miller v. Jackson (English 1977) – cricket case – 70 years of Crickett in Lintz, England – D cricket club. P built a house on edge of established cricket field – cricket balls occasionally strayed onto P's property. Cricket club took substantial efforts to prevent it after P complained (e.g., tall fence); also offered to pay for shatter-proof glass for P. Only 6 stray balls in one year; only 9 stray balls the next year. P, invoking doctrines of negligence and nuisance [not trespass], sued for an injunction to stop the trespass of balls onto her land. Trial court granted the injunction.

[NOTE how much factual speculation in Lord Denning's opinion – "I suppose ..."; and also unjudicious, biased language – "thoughtless and selfish act of an estate developer]

Court of Appeals (2-1 for reversal): In terms of deciding whether an injunction should be granted, Lord Denning's lead opinion draws a distinction between pre-existing nuisance ("coming to the nuisance") and a nuisance that occurs after P has occupied land.

* To obtain damages, P should plead tort of *negligence*; to obtain equitable relief, P should plead *nuisance*

Holding [Denning]: no nuisance because Cricket club did not "unreasonably" use its land in view of totality of the circumstances in this case [damages are a different issue – if a ball causes harm, then actual damages would be appropriate] – ct. balances parties respective hardships, also considers "public interest" (in strong favor of cricket club)

OTHER OPINIONS: Lane (although he agrees with the logic of the "coming to the nuisance" doctrine, Lane nevertheless would uphold injunction on ground that there is binding precedent,

Sturges v. Bridgman, old English case involving physician and confectionary shoppe; also no adequate remedy at law, particularly considering what he perceives a likelihood bodily injury; **Lane would uphold injunction but POSTPONE it for 12 months, in order to give Cricket club a reasonable opportunity to find a new playing field)**

Cumming-Bruce (would vacate the injunction based on the “public interest,” which, in his opinion, favors cricket – don’t deprive the entire village of cricket based on the female plaintiff’s “somewhat obsessive attitude”).

* Ct denies injunction but awards “past and future damages” (400 pounds)

Boomer v. Atlantic Cement Co. (NY 1970) – 8 neighbors (Ps) of \$45 mil. cement plant (D) (with 300 employees) sued for injunction and damages. Trial court found a “substantial” nuisance and awarded “temporary” damages, but denied an injunction. *Note*: Cement co. started its operation *after* Ps already lived there. Although the denial of injunction violated long line of old cases [holding that an injunction is automatic where “substantial” damage caused by D’s trespass or nuisance], Ct. of Appeals upholds trial court’s decision to deny injunction yet MODIFIES damages remedy (remands for award of present value of “permanent” damages) – appellate court rejects option of conditional grant of injunction or postponed injunction (no evidence that technological advances would occur within foreseeable future)

* temporary vs. permanent damages

* “It is a rare exercise of judicial power to use a decision in a private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.” (Casebook, at p. 483) —> regarding issue of “control of air pollution” – something for legislature more than courts, particularly not in a private litigation

* “The total damage to plaintiff’s properties is . . . RELATIVELY SMALL in comparison with the value of defendant’s operation and with the consequences of the injunctions which plaintiffs seek.” —> BALANCING PARTIES’ RESPECTIVE HARDSHIPS

DISSENT: permanent damages are an inadequate remedy at law; dissent says “public policy” (clean air) should be a factor here (“public interest”); this is in effect “inverse condemnation,” which is legally appropriate only where the “public interest” is served by it; dissent would grant injunction conditionally but give cement co. 18 months to cure problem

* Dispute between majority and minority over what is in the “public interest” (business or clean air) – judges’ respective ideologies/politics once again are key to opinion of scope of equitable remedy

LAW & ECONOMICS SCHOOL’S FIXATION WITH BOOMER: 1) why did Ps appeal (spending lots of money and effort) when they had been able to collect money damages in trial court that would have made them whole – in the hope of winning a much more profitable settlement on appeal; 2) Coase Theorem (Ronald Coase, *The Problem of Social Costs*)

Sawyer v. Davis (Mass. 1884) – in original lawsuit, P citizens in town; D, a manufacturer whose early bell ringing was originally held to be an actionable nuisance. Injunction issued. Subsequently, state and local legislation permitted bell ringing during pre-injunction hours. D then sued to dissolve injunction in light of intervening legislation. Original Ps contend that it would be unconstitutional to dissolve injunction – unconstitutional, they contend, because it destroyed plaintiff’s vested rights. Ct. dissolves injunction on ground that legislature’s “police powers,” so long as not exercised in an “unwholesome” manner, change the circumstances underlying original injunction. Only “grave” interferences with citizens’ property rights will result in a piece of legislation being declared unconstitutional. Not “grave here.” **CHANGED CIRCUMSTANCES HERE.** Injunctions don’t create “vested rights.” Equitable relief is no “final” (rather, it’s ambulatory).

Spur Industries v. Del E. Webb Development Co. (Ariz. 1972) – nuisance action based on flies/odor from a cattle-feeding operation. P, senior citizen real estate developer; D, cattle-feeding operation, which antedated residential development. Senior citizens themselves not parties. Over 1,000,000 lbs of cow dung produced a day. Lower court enjoined D. Ct. upholds injunction regarding citizens of Sun City community because it was (1) a “serious” nuisance that (2) negatively affected a “large number” of people. Ct. finds damages not “significant” enough for injunction related to Youngtown residents (they are relegated to money damages remedy). Ct. states that, if so many innocent residents not substantially injured, ct. would deny injunction. However, in view of the “public” interest at issue, injunction would be granted. However, ct. requires developer to **INDEMNIFY the developer as a condition of equitable relief.**

* “Public” vs. “private” nuisance – former much more likely to result in injunction

Conversion (involving “unique” chattels):

Burr v. Bloomsburg (NY 1927) – D converted P’s ring -- family dispute over diamond ring – P claims that ring has “peculiar sentimental value” and, thus, that money damages would be an inadequate remedy at law. Ct. holds that, where the chattel has a bona fide “*pretium affectionis*,” the plaintiff may obtain an injunction requiring D to return chattel. Ct. notes that, if parties ever put a monetary value on chattel (prior to litigation), then equitable relief would be denied – in Burr, the plaintiff’s monetary valuation was nothing more than an acquiescence under duress (not as if she filed an insurance claim claiming that amount)

* Contrast REPLEVIN: remedy at law – sheriff must seize property, which D can get back by posting a bond —> frequently viewed as an inadequate remedy at law

CLASS NOTES #11

EQUITABLE DEFENSES: “Unclean Hands Doctrine”

Carmen v. Fox Film Corp. (2d Cir. 1920) – P, Jewel Carmen, motion picture star from WWI era; D, Fox Film corp. As a minor, she executed contract with Fox. Subsequently, competing movie co. offered P a better contract. When she turned age of majority (21), she repudiated the Fox contract based on her minority at time of executing Fox contract. Second movie co. (Keeney Pictures Corp.) did not realize that P had pre-existing contract with D. When Keeney found out, it backed out of contract with P based on Fox’s threat to sue. P then sued Fox in equity for: (1) rescission of contract; and (2) enjoin Fox from interfering with P’s relationship with Keeney. Trial court ruled for P. Also sought damages. 2d Cir reversed, holding that the “immoral” conduct of P entitled her to no equitable relief from court. “That no action could be brought against her [by Fox] at law because of what she did does not alter the [im]moral character of her act.” P’s **UNCLEAN HANDS**. **Heavy moral tones in court’s opinion**. Equity “appeals to the conscience of a chancellor.”

Dicta regarding specific performance: “A court of equity always refuses specific performance of a contract which has been obtained by the plaintiff by sharp or unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent.”

QUESTION: Did Fox know about P’s minority at the time of the contract? Should that matter? Unclear from opinions, yet Fox Film did claim that it believed in good faith that Calif. law (rather than NY law) applied and that Calif. age for majority was 18 rather than 21.

Res Judicata Effect of Equitable “Unclean Hands” Dismissal: Carmen subsequently sued for money damages in tort (for interference with business relationship) – NY Ct. of Appeals held that dismissal of her bill in equity was not res judicata/collateral estoppel because the dismissal was not “an adjudication of the merits.” Carmen v. Fox Film Corp. (NY 1923) (affirming major damages award) —> contrast other equitable decrees that do operate as res judicata in subsequent legal actions

* according to Note 2, Casebook, at 504, Carmen’s award of significant money damages was an anomaly – usually dismissals based on successful invocation of equitable defenses do frustrate ability to collect money damages

QUESTION: Why didn’t “unclean hands” serve as a defense in the subsequent legal suit for money damages? Jurisdictions split over whether equitable defenses like “unclean hands” may bar a legal claim for damages. Texas law doesn’t seem to have a clear answer.

Claire v. Rue de Paris, Inc. (Ga. 1977) – Atlanta topless bar. Minority shareholder sued (in equitable action) for dissolution of corp. because of alleged acts of misconduct by majority shareholders. Alleged acts include selling liquor on Sundays (blue law violation), “watering down” drinks, and making unauthorized distributions of money from business without accounting for it. Ct. *sua sponte* invoked unclean hands doctrine because P himself admitted that he had made unauthorized distributions from company account. Ct. also notes related but distinct equitable estoppel defense

based on fact that P himself “participated” and “acted in concert” with D regarding the performance of illicit acts.

* *sua sponte* invocation of affirmative defenses – first time on appeal vs. court below? Some courts permit this, although usually only after notice and opportunity to respond.

Seagirt Realty Corp. (P) v. Chazanof (D) (NY 1963) – P corp. (whose sole shareholder originally owned real estate) was conveyed real estate from D (grandson-in-law of P’s sole shareholder), who is still the “owner of record” because P failed to record deed and subsequently lost it. P filed suit seeking equitable decree requiring D to execute a replacement deed. Prior to this lawsuit, P’s sole shareholder committed bankruptcy fraud with respect to real estate at issue by conveying it without consideration (to avoid creditors) to P’s sole shareholder’s son (who in turn fraudulently conveyed it to D, who then re-conveyed it back to P). Court finds an insufficient NEXUS between prior acts of fraud and particular real estate transaction at this case to apply unclean hands doctrine. “EQUITY IS NOT AN AVENGER AT LARGE.”

DISSENT: there is a sufficient nexus here – must look at entire series of transaction here

* Better example of insufficient nexus seen in Shaver v. Heller & Mertz Co. (8th Cir. 1901) (Casebook, at p. 508 Note 1) (P sued for trade name infringement; D countered that P itself had infringed other cos’ trade-names and invoked unclean hands defense; ct. rejects because no “*immediate and necessary relation* [between the fraud of P] and the equity for which he sues”)

* Nevertheless, in some cases, courts will apply the “unclean hands” doctrine in cases where equitable relief sought would harm or defraud the public-at-large – American University v. Wood (Ill. 1920) (Casebook, at p. 508-09, Note 2) (P, a fraudulent diploma mill, sued former employee who stole P’s mailing list and sought to open his own fraudulent diploma mill; P sued for an injunction; ct. applied unclean hands doctrine, even though P’s fraud did not directly relate to transaction at issue here, ct. nevertheless applied unclean hands doctrine to P’s equitable action because the injunction, if granted, would only aid P in *defrauding the public-at-large*)

Morton Salt Co. v. G.S. Suppiger Co. (US Sp Ct 1942) – Suppiger Co. sued Morton Salt for patent infringement (and sought injunction and accounting, both forms of equitable relief) based on Morton’s use of a salt-tablet depositing machine. Evidence showed that Suppiger had “restrained trade” by “tying” (anti-trust) license for use of its patented salt tablet depositing machine to sale of its unpatented salt tablets. Whether or not Morton was harmed by this improper (and likely unlawful) “tying,” Ct. refuses to grant equitable relief on ground that “tying” harmed public-at-large by restraining trade.

LACHES & STATUTE OF LIMITATIONS:

* **statute of limitations** – traditionally applied to actions “at law” vs. **laches** – traditionally applied to actions “in equity” [pre-merger distinction, yet even post-merger many jurisdictions still refuse to permit laches to be applied to legal claims subject to statute of limitations] – Texas law permits laches to be used as a defense regarding legal claims subject to statute of limitations, but only if

plaintiff's delay and defendant's prejudice "would work a grave injustice." Caldwell v. Barnes, 975 S.W.2d 535, 538 (Tex. 1998).

Talmash v. Mugleston (English 1926) – P sued to specifically enforce real estate contract executed 20 years ago. Undisputed that statute of limitations (S-O-L) would bar action at law for damages. D claimed laches and cites S-O-L "by analogy." Ct. holds that where S-O-L barred legal claim for damages, equitable laches doctrine would bar equitable claim for specific performance. If a case did not appear to be barred by analogy to S-O-L, then P would have to plead specific facts for invoking laches defense (*i.e.*, prejudice to D).

* Two elements of laches: (1) P's unreasonable delay and (2) undue prejudice to D

* although today most states have S-O-Ls that apply to equitable claims, laches may still be applied even if cause of action falls within S-O-L period if D shows undue delay by P and prejudice to D —> in such cases, laches will bar equitable relief and D will be relegated to an action at law for damages —> see, e.g. Groesbeck v. Morgan (NY 1912) (P buyer brought suit for specific performance of land sales contract nearly five years after execution of contract – barely with S-O-L period – in meantime, D seller had greatly improved value of land – laches applied and P relegated to action for money damages)

Beresovski v. Warszawski (1971) – P sued for specific performance of stockholders' agreement. Trial court treated it as a "contract" action subject to 6-year S-O-L for contract actions; appellate court reverses, finding that suit is more equitable than legal in nature (specific performance is equitable action), and thus applies 10-year S-O-L for equity actions.

Texas' statute of limitations: *No statutory dichotomy between equitable and legal claims, as some states have. Rather, series of statutes cover specific types of claims (e.g., 4 years for most legal or equitable contract actions, including specific performance and rescission; 2 years for most torts, although 4 years for a few (fraud/breach of fiduciary duty), 1 year for defamation).

Environmental Defense Fund, Inc. v. Alexander (Sec. of Army Corp. of Eng'g) (5th Cir. 1980) (Rubin, J.) – non-profit environmental group sued to enjoin construction of federally-financed waterway (Tennessee-Tombigbee) on ground that waterway exceeded size authorized by Congress. Substantial delay in bringing suit. P either knew or reasonably should have been aware of basis for cause of action. In the meantime, D spent hundreds of millions of dollars on construction. Ct. applies unreasonable delay & undue prejudice test – including "balancing equities" regarding PUBLIC INTEREST – and finds for D. No environmental "public" concern here.

EQUITABLE TOLLING:

Addison v. State (Calif. 1978) – Six-month statute of limitations for actions against state or local gov't. P filed timely federal court action against D, alleging federal civil rights violations and "pendent" state law claims for defamation, abuse of process and conversion (based on illegal search and seizure at P's car auction business). Federal case dismissed for lack of jurisdiction (couldn't sue public entities, which resulted in dismissal of pendent state law claims). P, within one week of

federal dismissal, then filed state law claims in state court – but *after* S-O-L had expired. D raised S-O-L defense in state court case. P contends that S-O-L was equitably tolled while P was pursuing, *reasonably and in good faith*, the federal court action. Ct. agrees. Rationale of S-O-L is to give D fair notice, so he can prepare to defend. Filing of federal cause of action did just that. No prejudice to D and no unreasonable delay by P. **EQUITABLE TOLLING APPLIED HERE.**

* United States v. Brockamp (US Sp Ct. 1997) – federal S-O-L on tax refunds NOT subject to equitable tolling —> Ct’s opinion notes “rebuttable presumption” that most statutory statutes of limitation are subject to equitable tolling – yet clear indication in Brockamp that Congress did not intend tax refund statute to have “implied” equitable tolling

EQUITABLE ESTOPPEL:

* E.E. doctrine may be used to get around s-o-l or to otherwise fill in a “gap” in a cause of action

Barry v. Donnelly (4th Cir. 1986) (Phillips, J.) – Va. diversity action – Declaratory Judgment action – Defendant is Donnelly, daughter of semi-famous painter, Gerald Murphym who seeks recovery of one of his paintings from former family friend (Barry), the plaintiff in this DJ action. D claimed painting was “loaned” to P on condition that she return it to artist’s family. P claimed it was a gift to her. P invoked 5-year statute of limitations against D; D countered that P was equitably estopped from invoking S-O-L.

Facts: Painting had been in P’s possession for over 20 years at time of lawsuit. She acquired possession in 1964. According to D, she agreed it was a loan in 1965. However, according to P, in 1978, she unequivocally asserted “ownership” over painting in letter to D. D claims that, shortly thereafter, in an oral conversation, P once again stated that she would return the painting and it was not until 1983 that D realized that P was really claiming ownership of the painting. Dist. Ct. agreed that the 1978 letter was an act inconsistent with bailment, thus triggering 5 year S-O-L. On appeal, D claims that oral conversation “equitably estopped” P from claiming s-o-l (which, according to D, did not kick in until 1983).

4th Cir.’s Holding: equitable estoppel defense to S-O-L applies where party asserting S-O-L, through “inequitable” words or conduct, caused other party to reasonably believe that S-O-L clock was not ticking (i.e., that a cause of action had not accrued). Outright fraud/deceit not required; only “inequitable” conduct and detrimental reliance. 4th Cir. vacates district court’s order and remands for evidentiary hearing on whether 1979 oral statement occurred and, if so, whether D reasonably relied on it to D’s detriment.

OPM v. Richmond (US Sp Ct 1990) (Kennedy, J.) – P lost his entitlement to federal disability benefits because of his good-faith reliance on erroneous advice from federal employee who gave him outdated information. Employee erroneously told P that he could work more than the actual amount permitted by law and still obtain benefits. P relied to his detriment on this erroneous advice and lost 6 months worth of benefits. He then sued – first administratively and then to Federal Circuit – for government for lost benefits. Fed. Cir., 2-1, ruled for P. Supreme Court reversed Federal Circuit. Sp Ct. held that, as a general matter, claims of equitable estoppel will not lie against

federal government. In this case, Ct. holds that E.E. not proper because Congress passed statute limiting benefits and, under Appropriation Clause of U.S. Const., Ct. has no authority to order money to be paid from U.S. Treasury without congressional appropriation. “[C]ourts cannot estop the Constitution.” “We decline today to accept the Solicitor General’s argument for an across-the-board no-estoppel rule.” Some exceptional case may apply. Ct. simply holds that an E.E. claim may never be a basis for a claim for money from the federal gov’t “in violation of a[n] [appropriations] statute.” P’s “remedy must lie with Congress” in this type of case.

EQUITABLE DEFENSES PECULIAR TO SPECIFIC PERFORMANCE, RESCISSION & REFORMATION:

* Editor of Casebook (p. 536) refers to “equitable principles limitation” that, in this modern era of “merger,” can apply to legal and equitable claims for relief

* **CLAIM OF “FRAUD”** (including **misrepresentation, concealment, non-disclosure**) as sword or shield – may be used “affirmatively” or “defensively” in an legal or equitable action (also may be used to thwart a S-O-L defense)

* **DIFFERENT SPECIES OF “FRAUD”** raises host of substantive law issues: Innocent vs. truly fraudulent misrepresentation; affirmative concealment; silence where no duty to disclose vs. silence where duty to disclose

Example of affirmative legal claim: tort action for fraud, seeking money damages

Example of affirmative equitable claim: action for rescission/reformation of a contract based on one party’s fraud at time contract was executed

Example of defensive legal claim: money damages claim for breach of contract barred by plaintiff’s fraud

Example of defensive equitable claim: specific enforcement barred by plaintiff’s fraudulent conduct

Ex. of use of fraud defensively as a “shield” in equity case:

Kelly v. Central Pacific RR Co. (Cal. 1888) – P, buyer, sued r.r. co. (seller) for specific performance of land sales contract. D countered that P had fraudulently misrepresented that he would like on tract of land purchased. P lied about his intent to live on land. Claim of “fraudulent inducement” to contract (which may be pleaded affirmatively as a tort). Ct. agrees that P’s fraud was sufficient to bar his equitable action for specific performance. Ct. notes that, when fraud used defensively, D need not show that he was harmed by fraud – rather, merely that, but for fraud, D would not have agreed to enter into contract.

* In order to assert ***affirmative equitable claim*** of fraud, seeking rescission of contract, plaintiff must establish harm/damage

* In order to assert ***affirmative legal claim of fraud***, seeking money damages (in tort), plaintiff would have to establish damages – not so when used defensively

* INNOCENT vs. FRAUDULENT MISREPRESENTATION:

Wisherd v. Bollinger (Ill. 1920) (Casebook, at p. 539-40, Note 1) (apparent majority position) – one party’s innocent misrepresentations may result in an equity court’s refusal to specifically enforce a contract ***so long as other party detrimentally relied on innocent misrepresentation***

* yet innocent misrepresentation will not support affirmative legal claim for damages (Note 3, Casebook, at page 540)

QUESTION: will it support affirmative equitable claim for rescission? Most courts say yes, so long as detrimental reliance

Standard Steel Car Co. v. Stamm (Pa. 1904) – P, an agent for Standard Steel, obtained option to buy D’s land. P sued for specific performance, yet trial court denied it because, at the time parties entered into option contract, P had failed to disclose fact that D’s land would vastly increase in value in immediate future (because company was moving to town who would want to buy land). Appellate court reverses. At time option contract entered into, there was adequate consideration. Arm’s length transaction. ***P had no duty to tell D about what future might hold.*** Ct. Adds that even if P knew with certainty that land would increase, here he did nothing fraudulent by not offering that fact to D (***not as if he lied when asked – never asked***). CT. ORDERS SPECIFIC PERFORMANCE.

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING:

* Cts. (as well as UCC & Restatement (2d) of Contracts) uniformly hold that all parties to a contract have an IMPLIED “duty of good faith and fair dealing” —> This is an EQUITABLE CONSIDERATION courts in contract cases must apply — based on nebulous concepts such as “unconscionability,” “overreaching” or exploitation and intentional frustration of intent to contract —> can be used to modify or dilute terms of contract in legal or equitable actions

Market Street Associates Ltd. v. Frey (7th Cir. 1994) – P, lessee/putative buyer (Market Street), sued D, lessor/putative seller, for specific performance of option-to-buy provision in commercial lease (“¶ 34”). Dist. ct. found that P was not entitled to specific performance because P violated covenant of good faith and fair dealing in carrying out option-to-buy portion of lease.

Facts: ¶ 34 provided that, in order to buy out property, P must first give D opportunity to finance sale; if P rejected that option, then D would seek outside financing and purchase property based on a formula in contract (which set an incredibly low price). After an exchange of vague and somewhat ambiguous letters between parties and their attorneys, in which P expressed interest in exercising option to buy and finance, D rejected offer. Yet key letters didn’t mention ¶ 34. Dist. ct. found that P was aware that, through oversight, D was unaware of ¶ 34 at time of negotiations. Trial court found that P “set trap” and “tricked” D.

7th Cir.’s Holding: affirms district court on ground that P deliberately exploited D’s unilateral mistake of fact regarding ¶ 34 and its buy-out provision

* Rawlsian “original position” (Kantian Philosopher John Rawls) definition of specific performance on page 546 of Casebook

Dalton v. Educational Testing Services (ETS) (NY 1995) – P, student accused of cheating on SAT; D, ETS. ETS refused to release P’s test scores. Trial court held that D violated implied covenant of good faith and fair dealing by refusing to adequately apply provision of contract that required D to follow certain procedures in allowing student accused of cheating to “appeal” finding of cheating. Trial court entered equitable decree requiring ETS to release test scores. On appeal, ct. modified decree by requiring ETS to act in good faith by affording D his “appeal.” Ct. relies on fact that contract left it within “discretion” of ETS to decide “appeal.” Yet held that covenant of good faith & fair dealing required party not to act “arbitrarily” or “irrationally” in exercising that discretion. Ct. held that trial court’s decree went beyond implied covenant by actually reading into contract more than terms fairly required.

* Court notes “academic discretion” doctrine – decisions of teachers, schools (and, by analogy, ETS) are generally due tremendous deference by courts

EMPLOYMENT “AT WILL” DOCTRINE & IMPLIED COVENANT:

Doctrine of employment “at will” subject to some limits under implied covenant:

Wieder v. Skala (NY 1992) – attorney in law fired after he reported firm’s ethics violations to bar. Court of Appeals held that, notwithstanding “at will” nature of employment contract, there was an “intrinsic” aspect of the contractual relationship that all parties would comply with rules of legal ethics. Ct. holds that plaintiff stated a cause of action for breach of contract based on the implied covenant to follow rules of ethics as part of employment relationship.

CLASS NOTES #12

Breach of Fiduciary Duty as a Defense to Specific Performance:

Firebaugh v. Hanback (Va. 1994): P, real estate agents/buyers, sued for specific performance of land sales contract. Ct. held that P had breached fiduciary duty to D, seller, and thus ct. refused to specifically enforce contract. P was originally real estate agent for D. Agent left his firm after firm could not sell property and purchased it himself. P wrote land sales contract. Contract, in a somewhat confusing manner, stated sale was for 126 acres; however, P knew that D seller intended for it to be a “sale in gross” rather than a sale for a specific acreage. P sought specific performance with abatement in purchase price for alleged acreage deficiency. Ct. held that, because P knew what D intended and failed to explain what contract terms actually meant. P owed D a fiduciary duty, which P breached here. Ct. also mentions “unclean hands” doctrine. SPECIFIC PERFORMANCE REFUSED.

* **Nature of “Fiduciary Duty”**—Cardozo’s discussion—Note 1, Casebook, at p. 560-61: much more than the “customarily morality”—rather, fiduciary “is held to something stricter than the morals of the marketplace” and must act with “the punctilio of an honor most sensitive”

SEC v. Capital Gains Research Bureau (US Sp Ct 1963) (Casebook, at p. 561-62, Note 2) – SEC moved for a mandatory injunction seeking to require a registered investment adviser to disclose to all clients his own dealings in recommended securities before and after his recommendations. Lower courts denied injunction on ground that security investor’s failure to so disclose did not amount to “fraud” or “deceit” within the meaning of the S & E Act. *The Supreme Court reversed. Ct. held that “fraud” in equity context has a different meaning than “fraud” in common-law context (i.e., actions for damages).* Holding that an investment advisor was a “fiduciary,” Ct. held that a fiduciary has a duty of “*utmost good faith*” duty of “*full and fair disclosure of all material facts.*”

* Jurisprudential Debate over whether parties to a contract must have equal knowledge of all material facts – Casebook, at p. 562, Notes 3-4: **Chancellor Kent** took the position that “when the aid of a court of equity is sought, to carry into execution a contract [of sale where the buyer failed to disclose to seller a material value in property of which seller was unaware], then the principles of ethics have a more extensive sway” and buyer with “superior knowledge” to seller cannot seek specific performance [Note: he was referring to a non-fiduciary situation]. **Cicero** took the same position regarding the “corn merchant” in Alexandria, Greece, who failed to disclose during corn shortage that other corn shipments were on the way. OTHER TRADITIONAL ETHICISTS HAVE TAKEN A DIFFERENT POSITION, as do most modern courts —> *Most courts today require something more than mere non-disclosure of material facts* (such as inadequacy of consideration or fraud/deceit).

Mistake as a Ground for Rescinding/Reforming Contract:

Casebook, at p. 563, Notes 1-6: **unilateral vs. bilateral mistake** in formulation or attempted formulation:

1) both parties mistaken about subject matter of contract (famous “Peerless” ships case) – rendering contract void ab initio *as a matter of law and equity* – never a “meeting of minds”

2) written contract contains a term different from oral agreement (paradigmatic “Blackacre/Whiteacre” situation – *remedy is reformation of contract (equitable remedy)*)

3) situation where oral and written contracts the same but where there is a MUTUAL MISTAKE as to some essential element of the agreement – *remedy is rescission of contract (equitable remedy)*

4) One party knowingly induces other party’s unilateral mistake – tantamount to fraud – *remedy is rescission*

5) Situations where no fraud, mutual mistake, etc., *but cts refuse to specific performance as inequitable* (e.g., unilateral mistake with detrimental reliance)

* Void vs. voidable contract

Costello v. Sykes (Minn. 1919): P, buyer of bank stock, filed suit to rescind contract for sale of bank stock. At time of contract, both parties believed stock was worth \$136 per share when in fact it was worth only \$60 – HONEST MUTUAL MISTAKE REGARDING VALUE OF STOCK (bank employees, unrelated to parties, had defrauded bank of assets and bank’s books didn’t reflect this) – no fraud or concealment by either party. Also, “the means of information [regarding value of stock] were open alike to both parties.” Not as if total failure of consideration. CT. DENIES RESCISSION ON GROUND THAT MISTAKE DID NOT GO TO AN “ESSENTIAL” TERM OF THE BARGAIN.

Dissent: contends that mutual mistake concerned an “essential fact” forming inducement to the contract

Note: other courts have disagreed with Costello – see Clyburg v. Whitt, 171 N.W.2d 623, 626 (Ohio 1969) (holding that mutual, significant mistake regarding value of subject of bargain is an “essential” term that justifies rescission of contract)

Panco v. Rogers (NJ 1952): P, Panco, was old, deaf and uneducated man; his daughter and wife, who participated in negotiations, spoke with heavy accents. P agreed to sell real estate to D. Original asking price was \$12,500. However, selling price in written agreement was reduced to \$5,500. Property worth much more than \$5.5K. P seeks rescission; D counter-claims for specific performance. Mutual mistake during parol negotiations -- i.e., P thought he was asking for \$12.5K and D thought he was agreeing to \$5.5K – yet UNILATERAL MISTAKE in execution of written contract. Ct. notes that, ordinarily, unilateral mistake is not a basis for rescission in absence of some overreaching, fraud, etc. on part of non-mistaken party and no negligence on part of mistaken party. Ct. denies rescission since unilateral mistake and D did nothing wrong. Yet, in view of totality of circumstances, Ct. also denies D’s counter-claim for specific performance. Ct. notes that “**gross** inadequacy of price” by itself can defeat specific performance. *P relegated to action at law for money damages.*

Volpe v. Schlobohm (Tex. 1981): P and D entered into food distribution partnership agreement. Dispute later arose over whether Pepperidge Farms franchisees were to be excluded from partnership assets. Ct. grants rescission based on PARTIES' MUTUAL MISTAKE regarding essential component of agreement. Here terms of written agreement did not address issue and parties labored under different honest beliefs. Mutual mistake doctrine need not concern parties' mistake about same thing, so long as their joint mistakes resulted in parties' never having a meeting of the minds.

* Ct. notes that rescission is proper remedy only where it can restore parties to their original positions and if innocent third-parties are not prejudiced

Krezinski v. Hay (Wisc. 1977): P sued D and D's insurance co. for injuries P sustained in 1968 auto accident. D asserted "release" as an affirmative defense. Earlier out-of-court insurance settlement purporting to cover "all known and unknown personal injuries, developed or undeveloped." P contended that written release invalid because parties had a mutual mistake regarding whether P had a "latent" but "present" condition causing seizures. P stated that parties had relied on a physician report that did not pick up on latent defect and that parties did not intend broad language of contract to cover latent but present conditions not picked up by doctor. Trial court granted summary judgment for D. Appeals court reverses, holding that broad language of release did not necessarily foreclose mutual mistake issue if, at time of contract, both parties did not intend release to cover present but latent conditions not picked up by doctor.

Mutual of Omaha Ins. Co. v. Russell (10th Cir. 1968): P's wife killed in plane crash (second leg of round-trip) – 12 hours after flight insurance policy had lapsed. Had Policy # T-18 rather than Policy # T-20. She intended to get T-20, but vending machine not working, so she bought it from live agent. Only got it for 4 days' worth of coverage, assuming that is when she would return. Her round trip actually occurred shortly thereafter. P intended for policy to cover round-trip. Dist. ct. reformed contract to apply to P's round-trip, even though it fell outside literal terms of T-18.

10th Cir.: Reformation appropriate remedy only where (1) mutual mistake or (2) unilateral mistaken coupled with fraud or inequitable conduct on part of non-mistaken party. Here, no mutual mistake – only unilateral mistake. 10th Circuit held that district court's reliance on "rush" nature of this type of transaction did not rise to the level of inequitable conduct by D. REFORMATION DENIED.

Nash v. Kornblum (NY 1962): P, fence building co.; D, summer camp operator. Chain link vs. "hex netting" fence. 484 vs. 968 feet. First offer was for chain link fence (which required only 484 feet of it to make 10' fence); first offer rejected. Second offer was for hex netting (which required 968 feet of it – double amt of chain link -- to make same 10' fence since it had to be doubled). D accepted second offer. D understood second offer to provide twice amount of fence for almost same price as chain link offer. P sought to reform contract to reflect to reflect 484 "linear" feet (which is 968 feet of hex netting). P stated that the 968 feet did not refer to total length of fence for agreed price and was result of inadvertant "typo." Trial court refused reformation on ground that D did not act fraudulently. Ct. holds that reformation is appropriate here. Not mutual mistake in the classic sense. Parties' oral agreement was for 484 linear feet of hex netting fence for contract price. Each understood that at time of oral agreement. P's subsequent "scrivener's error" – which D sought to exploit knowing the error – was a basis for reformation. No need to establish "fraud" by D'

inequitable conduct enough here.

* Effect of PAROL EVIDENCE RULE on Rescission/Reformation Remedies:

Sabo v. Delman (NY 1957) (Casebook, at pp. 579-80, Note 1): parol evidence rule applies only to suits seeking to enforce written contract based on alleged oral statements made before written contract executed. Parol evidence rule does **NOT** apply to equitable actions seeking to **RESCIND** contract based on fraud during oral negotiations (fraudulent inducement).

Brandwein v. Provident Mutual Life Ins. Co. (NY 1957) (Casebook, at p. 580, Note 2): Neither parol evidence rule nor statute of frauds precludes equitable claim for **REFORMATION** where (1) MUTUAL MISTAKE or (2) UNILATERAL MISTAKE couple with fraud or inequitable conduct on part of D.

Mistake as a Defense to Specific Performance:

Mansfield v. Sherman (Maine 1889): P, buyer of real estate, seeks to specifically enforce land sales contract for property owned by D. D unilaterally mistaken about which property he was selling (turned out to be a much more valuable one than he intended to sell for asking price). P “knew that the [asking] price was very low for” such a lot. Yet no fraud or concealment shown. Nor was it shown that P even was aware that D was mistaken. CT. DENIES SPECIFIC PERFORMANCE and relegates P to an action for damages.

Louisville & Nashville RR Co. v. Solchenberger (Ala. 1960) (Casebook, at p. 582, Note 1): ct. refuses specific performance where P’s agent was aware of material mistake upon which D had relied on entering into a written contract. NO FRAUDULENT CONCEALMENT in a legal sense, but for purposes of equity, ct. refuses specific enforcement. More than just simple unilateral mistake by one party.

Hardship/Unfairness:

Patel v. Ali (English 1984): P sought specific performance of land sales contract. P, buyer of real estate, and D, seller, entered into land sales contract. ***Almost four years of delay passed before closing could occur. Delay was not fault of either party.*** Meanwhile, after execution of contract but before expected closing, D’s life went to hell for reasons totally unrelated to P. D pitiful by time of specific performance action (cancer victim, amputated leg, husband in prison). Needed to remain in house since her support system all lives nearby. D counters that specific performance should be denied because of extreme hardship it would create. Ct. notes that ordinarily hardship – without fault of plaintiff -- not enough to bar specific enforcement. Furthermore, when hardship considered a bar, it was hardship in effect at time contract signed and hardship related to subject matter of contract. Here, this is not the case. Rather, a “personal” hardship on D that occurred after contract signed. Nevertheless, ct. exercises “broad” and “evolving” equitable powers and ***refuses specific performance***. Ct. notes that, although hardship occurred after contract executed, it resulted from UNFORESEEABLE delay in closing and unforeseeable changed personal circumstances that were not within parties’ original contemplation. P relegated to remedy of damages.

* UNCONSCIONABILITY/UNFAIRNESS – which is equitable in origins – also has been bar or cap damages in legal actions where P seeking \$ damages acted unconscionably – prime example is Williams v. Walker-Thomas Furniture Co. (D.C. Cir. 1965) (Casebook, at p. 587, Note 3)

Inadequacy of Consideration:

Jefferys v. Jefferys (English 1841): stands for well-established proposition that specific performance of a contract will be denied where there was “inadequacy of consideration” (here no consideration of value)

Seymour v. Delancey (NY 1822): P filed an equity action for specific performance on a land trade contract; D countered with defense of “great inadequacy of price” (i.e., one property worth less than ½ of other). Chancellor Kent, sitting as the trial judge, held that, in order for there to be specific performance, there must be “adequate consideration.” Inadequacy of consideration enough to block specific performance, even without any inequitable conduct, although inadequacy of consideration not enough for rescission. Kent looked to D’s questionable mental competency together with inadequate consideration and denied specific performance. On appeal, appellate court, by a divided vote, reversed Kent’s judgment. Holding: mere inadequacy of consideration NOT enough to block specific performance. Rather, inadequacy must be so “GROSS” as to “amount to fraud.” Not so here. SPECIFIC ENFORCEMENT GRANTED.

McKinnon v. Benedict (Wisc. 1968) [populist court]: D, trailer park/campsite owner; P, neighboring property owner who was an attorney. P obtained an injunction (specific enforcement of contract) in trial court against D’s operation of trailer park/campsite. P’s property surrounds D’s property. P loaned D \$5,000 for downpayment on D’s property on the condition that D wouldn’t make any improvements or cut timber on D’s property “for a period of 25 years.” After executing contract, D faced tremendous financial pressure, decided to violate agreement by operating a campsite/trailer park. P, a rich lawyer, only there certain times of year (D there all year) and campsite/trailer park not visible to P during summer months because of leaves on trees. Appellate court reverses trial court’s injunction (specific performance). Finds that **consideration (\$5,000 loan) was “so gross as to be unconscionable”** in view of great hardship that resulted on D. Ct. balances equities of parties. P relegated to legal remedy of damages.

STATUTE OF FRAUDS:

- * first such statute enacted in England in 1677
- * sale of land, certain sale of goods (originally 10 pounds = \$15) or actions/services that cannot be performed within one year
- * must be a “memorandum in writing” that is “signed by the party to be charged therewith” (or agent thereof)

* *Statute of Frauds vs. Parol Evidence Rule*

Mentz v. Newwitter (NY 1890): P, seller of real estate; D, buyer of it at an auction. Informal

“contract” was signed by P’s agent. However, *it failed to state the name of the seller*. Ct. finds that failure to “memorandum” to state name of seller of real estate was fatal under S-O-F as lacking an essential term of sale.

Tobias v. Lynch (NY 1922) (Casebook, at p. 603, Note 1): Parol evidence may be used to prove that a person identified in a written contract is the seller or buyer.

Thurlow v. Perry (Maine 1910) (Casebook, at pp. 603-04, Note 2): ct. holds that contract failed under S-O-F for failing to state the purchase price (as orally agreed by parties) – all essential terms must be included in writing in order to satisfy the S-O-F

* If oral agreement did not fix price, then S-O-F cannot be used to defeat contract on ground that writing did not include a price – if possible, court will fix a “reasonable price” – cf. Ammerman v. City Stores (parties never agreed to lease amount, but did agree that it would be equivalent to other leases).

CLASS NOTES # 13

STATUTE OF FRAUDS con't ...

Laythoarp v. Bryant (English 1836) – P, seller of real estate; D, buyer. After signing land sales contract, D repudiated contract. After repudiation, P sold the property to a 3rd party and then sued D to recover the difference in price. D defended on the ground that P had never signed the contract. Court held that the “party to be charged” – *i.e.*, the defendant – is the only signature required under the S-O-F.

* minority of jurisdictions’ S-O-F expressly requires a land contract to be signed by vendor/lessor, even if vendor/lessor is the plaintiff in suit; a few jurisdictions even interpret English model statute to require vendor/lessor’s signature, even if vendor/lessor is plaintiff

* Texas is in majority position here (vendor needn’t sign if vendor is plaintiff)

Bailey v. Sweeting (English 1861) (Casebook, at p. 607, Note 2) – D’s letter (rejecting prior oral agreement) was sufficient to satisfy S-O-F —> which mentioned items to be purchased and purchase price and was signed by D

* ORAL MODIFICATION OF A PRIOR, WRITTEN CONTRACT – if subsequent oral modification of written contract fails under S-O-F, then original contract is not rescinded – see Restatement (2d) of Contracts § 149

FRAUD AS A BASIS TO GET AROUND S-O-F:

Mullett v. Halfpenny (English 1699) – party can’t use S-O-F to perpetrate fraud

Gilbert v. Gilbert (NJ 1960) – probate contest -- P agreed to marry Ds’ dad based on dad’s oral promise that he would leave his property to P in his will. They were married and dad executed such a will; however, dad later changed his will to leave property to his children (Ds) instead. When dad died, P sought to enforce dad’s oral promise in probate contest. Children countered by raising the S-O-F. P contended that dad’s breach of oral promise was fraudulent, and thereby sought to get around S-O-F. Ct. held that mere repudiation by dad of his oral promise after marriage was insufficient evidence of fraud. Can’t infer fraud from his change of position. **“Something more . . . [is] require[d].”** Ct. distinguishes situation of a promisor’s lying at time of oral agreement with the intent never to carry out the agreement (fraudulent inducement or promissory fraud). No proof that dad did that here. Ct. also refuses to apply “partial performance” exception to S-O-F outside land sales context.

Finucane v. Kearney (Miss. 1843) – ct. holds that, just as with situation when a party fraudulently promises to reduce oral contract to writing (with the intent not to do so), S-O-F will not apply where an “unavoidable accident” prevents the oral contract from being reduced to writing. In this case, the vendor died before he could carry out his promise to reduce the land sales agreement to writing.

PARTIAL PERFORMANCE EXCEPTION TO S-O-F (judicially-created equitable exception to statute – most commonly applied to land sales contracts – S-O-F does not render non-complying oral contract void; merely unenforceable yet that is waivable in equity when applying the S-O-F would itself be inequitable):

Steadman v. Steadman (English 1974) – oral agreement between former husband and wife, whereby ex-husband orally agreed to pay ex-wife 1500 pounds for her half-interest in their former house. Husband in arrears in alimony and child support; the agreement would settle his debt to her. Wife later refused to sign a written contract after husband had borrowed 1500 pounds from the bank, paid wife 100 pounds, and had paid his lawyer 25 pounds to prepare a deed of transfer. Husband contended that the oral agreement was enforceable under the “partial performance” exception to the S-O-F. Wife disagreed, and claimed that the S-O-F rendered any oral agreement unenforceable. Ct., in a divided vote, held that “partial performance” exception applies. Majority reasons that, although classic example of partial performance involves a putative buyer taking possession of land, here there was sufficient partial performance. Acts allegedly constituting partial performance must “unequivocally, and in their own nature, [be] referable to [the alleged] oral agreement.” **Two judges in majority refer to this test as only requiring acts to show “prima facie” case of oral contract or that it is “more probable than not” that oral contract existed.**

* Lord Salmon’s separate “speech” raises an interesting issue: what if party admits (in open court or in pleading) the existence of an oral contract? Does that bring case out of S-O-F? (in Steadman, wife admitted oral contract in open court) → MAJORITY RULE IN U.S. FOLLOWS “JUDICIAL ADMISSIONS” DOCTRINE – real estate and sale of goods (UCC follows this approach)

DISSENT (Lord Morris): there must be more than partial performance – must also have been a change in the parties’ relative positions and, moreover, the act in question must be one that “unmistakably” points to the existence of an oral contract

QUESTION: doesn’t majority’s “prima facie” case approach water down “unmistakable” test?

* **Promissory Estoppel/Detrimental Reliance** in land sales/other contracts not within the statute of frauds – Restatement (2d) of Contracts, §§ 129 & 139: if one party, in a foreseeable and reasonable manner, detrimentally relies on oral promise of other party, then the S-O-F does not apply, although specific performance is not necessarily the appropriate remedy (restitution may be more appropriate)

* jurisdictions divided on partial performance doctrine (even in land sales context) – Texas applies the p.p. exception, at least in land sales context – see Boyer v. Tarber, 834 S.W.2d 60, 63 (Tex. 1992).

White v. Production Credit Assoc. of Alma (Mich. 1977) – In 1970, P, cattle farmer, entered into an oral agreement with D lender, whereby D was to lend P \$128K in order to operate his cattle business in 1972 and 1973 business years. P also agreed to borrow \$ for an irrigation project. The latter loan was done in writing (written security agreement). D lent \$ for irrigation project. Subsequently, D changed its position regarding the original \$128 K loan. P was unable to secure

alternative financing for that loan because all his property was pledged as security on the irrigation loan. P ended up losing over \$100K based on D's refusal to make loan. D countered with S-O-F defense, since original contract could not be performed within one year. Ct. held that **P's detrimental reliance** on D's oral promise and subsequent actions (irrigation loan/security agreement) "estopped" D from relying on S-O-F.

Burns v. McCormick (NY 1922) (Cardozo, J.) – alleged oral agreement between old man and Ps, whereby if they moved in and cared for him, they would receive his home when he died. After he died, Ps sued his estate for specific performance of the oral promise. Ct. refused, relying on S-O-F. Ps' action not "unequivocally" proof of the alleged oral agreement. Alleged acts of "part performance" must be "solely and unequivocally referable to a contract for a sale of land." Not so here. No proof of fraudulent inducement here. Ps relegated to promissory estoppel/restitution remedies.

* S-O-F and restitution/promissory estoppel actions – usually, S-O-F does not bar actions for restitution

Smith v. Hatch (N.H. 1865)(Casebook, at p. 626, Note 2) – P (Hatch) and D (Smith) agreed that Hatch would sell Smith the former's farm in exchange for Smith's wild lands and \$. Smith conveyed his wild lands for Hatch, who sold the wild lands for \$ and refused to convey Smith the farm. Smith sued for restitution of the proceeds from the sale of the wild lands rather than for specific performance of original land sales contract (i.e., conveyance of Hatch's farm). Hatch opposed restitution on the ground that Smith was not barred from seeking specific performance under the "part performance" exception to the S-O-F. Ct. rejected Hatch's argument. Plaintiff may *elect particular remedy* when he has a choice of more than one.

* another exception to S-O-F is when the defendant is in a "**confidential**" or "**fiduciary**" relationship with P

Hewitt v. Parmenter (Minn. 1930) – Oral agreement to renew lease. P, lessee, sued D, lessor. P sued for damages based on wrongful eviction. D raised S-O-F. P countered with "part performance" exception, pointing to work that he had done on D's land after oral lease and before repudiation, which improved value of land. Ct. rejects P's invocation of "part performance" exception since P was seeking \$ damages, not equitable relief (such as specific performance or restitution) —> this appears to be approach in all jurisdictions

NEW TOPIC: failure to meet condition precedent as a defense to specific performance

Lord Ranelagh v. Melton (English 1864) – P, lessee; D, lessor. Buy-out clause in lease. Clause required P to give notice within 7-year period and give 3 months' notice to D and "shall, at the expiration of such notice," pay certain price for land. P sent notice within 7-year period, but P failed to tender the purchase money within the 3-month period. D refused to excuse default. P then sued for specific performance. Ct. holds that 3-month provision was a "condition precedent" to land sales contract, such that P's failure to meet condition precedent barred P from seeking specific performance.

* **Ct. draws distinction between** (1) situation where parties enter into a land sales contract (equitable conversion occurring) and set a date for closing (not a condition precedent); presumption there is that time is not of the essence; and (2) situation where parties contract that, if a condition precedent is met, then the parties will have entered into a land sales contract (there, no equitable conversion occurs until condition precedent met and no specific performance if condition precedent not met)

Gannett v. Albree (Mass. 1869) – P, lessee; D, lessor. P sued for specific performance of residential lease renewal agreement. D countered that specific performance was not proper since P had breached a restrictive covenant in the lease, which stated that P could not sub-let the residence for commercial purposes (P sub-let it to a third-party for a boarding house). Based on P's breach of the covenant, court denies P's request for specific performance of lease renewal.

TIME-OF-THE-ESSENCE CLAUSES:

Parkin v. Thorold (English 1852) (Sir John Romilly, Master of the Rolls) – P, seller of real estate; D, buyer of real estate. Land sales contract contained a provision that closing was to occur on a specific date (October 25, 1850). Seller's lawyer lost some paperwork needed for closing, so closing did not happen on October 25th. Purchaser was willing to extend closing date only until November 5, 1850. By January 8, 1851, seller finally was ready to close, but buyer refused to close and demanded his earnest money back. Seller then sued for specific performance. Ct. granted specific performance. Ct. notes that "time-of-the-essence" doctrine applies differently at law and in equity. At law, time provisions in contracts are always enforced; if breached, other party may sue for damages. In equity, however, not enforced unless (1) express provision in contract that time is of the essence; or (2) by necessary implication, that time is of the essence, i.e., circumstances show that parties intended time to be of the essence. Also, if non-breaching party can establish **actual prejudice** from breach of time provision, then equity will enforce time provision. In instant case, not express or implied and D could not establish prejudice as a result of P's delay (no laches). Time not of the essence here; specific performance granted.

JNA Realty Corp. v. Cross Bay Chelsea, Inc. (NY 1977) (Wachtler, J.) – P, lessor; D, lessee. P's action for recovery of leased property, claiming lease had expired. Renewal provision in lease. D had sent renewal notice, but not in a timely manner (under terms of lease) as a result of neglect or inadvertence. Trial court found D "negligent" in failing to renew lease. Ordinarily, failure to exercise an option within allotted time period waives any right party has. Here, however, D seeks to avoid by asking court to prevent a "forfeiture." "**Equity abhors a forfeiture.**" Here, tenant made substantial improvements to leased property in anticipation of lease renewal. Requiring D to return property thus would work a "forfeiture." Ct. holds that, in such a potential forfeiture situation, so long as defaulting party "merely" negligent and also so long as other party has not been unduly prejudiced, time provision will not be treated as "of the essence." Ct. remands for determination of whether P prejudiced by D's delay.

DISSENT: here D's "sheer careless" not tantamount of "honest mistake." Equity relief should not lie.

* Cf. majority in JNA with Judge Cardozo's famous dissent in Graf

QUESTION: what would an alternative equitable remedy have been? Mandatory injunction requiring D to return property on the condition that P pay restitution to D for value of improvements [cf. Spur Industries case, supra]

EQUITABLE WAIVER/ESTOPPEL OF PROVISION IN CONTRACT:

Spaulding v. Agri-Risk Services (9th Cir. 1988) (Casebook, at page 641, Note 2) (Re, J.) – P owned race horse insured by D insurance co. P castrated horse. Policy provided that castration would terminate the insurance policy. For 4 months after castration – **during which time D was on notice of it** – D did not seek to terminate policy and, instead, led P to believe that policy remained in effect (never mentioned P's default). D also consented to humane destruction of horse. Thereafter, when P sought to cash in on policy, D asserted that P had breached anti-castration clause of policy and refused to pay. Trial court granted summary judgment for D after finding breach by P. 8th Circuit vacated and remanded for further proceedings (since facts recited were taken in a light most favorable to P on appeal). Here, if P can establish estoppel, P should prevail because of detrimental reliance by P on D's waiver/estoppel.

Heckard v. Sayre (Ill. 1864) – P, buyer of land; D, seller of land. P sues for specific performance of land sales contract. “[P]lain and unambiguous” **express time-is-of-the-essence provision** regarding payment of balance of purchase price on specific dates and express forfeiture provision. P missed payment date by 6 days. D refused to accept late tender of remaining \$. Ct. refuses specific performance. Ct. holds that even in equity ct. will deny specific performance when contract has an EXPRESS time-of-essence provision, as in this case. No suggestion of fraud or inequitable conduct by D or an “honest mistake” by P. Rather, evidence showed that P simply lacked money on due date.

Edgerton v. Peckham (NY 1844) (Casebook, at p. 643, Note 1) – **ct. takes a somewhat different approach than Ill. Sp. Ct. in Heckard** – here, ct. grants specific performance and refuses to forfeit P's prior payments based on P's 17-day default. Ct. does not consider “express” time-is-of-essence provision to be dispositive. Rather, also considers fact that P had paid 2/3rds of purchase price and made substantial improvements to land (which he had possessed prior to default). Ct. considers it to be an “honest mistake” by P. Equity abhors a forfeiture.

*** SPECTRUM in equity cases – Heckard/Graf majority <-----> Edgerton/Graf dissent

Freedman v. Rector (Cal. 1951) (Note 2) – court refuses specific performance but requires seller to give buyer back prior payments [restitution], where seller re-sold after buyer's breach and lost no money – cf. cases refusing to enforce liquidated damages provisions that bear no reasonable relationship to actual damage to non-breaching party

Henry Uihlein Realty Corp. v. Downtown Develop. Corp. (Wisc. 1960) (Note 3) – Ct. recognizes equitable doctrine of “**equity of redemption**” in order to avoid forfeiture upon strict foreclosure –

discretionary doctrine whereby trial court may give defaulting purchaser a reasonable amount of time to comply with land sales contract – factors to consider include how much of the purchase price already paid (and whether buyer has made any valuable improvements on property), whether seller suffered any undue prejudice, and buyer – TOTALITY OF THE CIRCUMSTANCES APPROACH

Fifty States Management Corp. v. Pioneer Auto Parks, Inc. (NY 1979) – P, landlord; D, tenant. Tenant defaulted on commercial lease, triggering an acceleration clause (requiring payment of all rents for remaining 20 year lease term). D seeks to avoid P's lawsuit by claiming that "equity abhors a forfeiture." Ct. rejects this contention. Ct. holds that, absent fraud or inequitable conduct by lessor or excusable neglect by lessee, acceleration clauses will be strictly enforced unless breach of "trivial" or "immaterial" provision of lease. Here, provision that was breached was "essential" term of lease – namely, provision requiring payment of rent on a specified date. And evidence showed that P knowingly and voluntarily entered into lease with this covenant/acceleration clause. Not "boilerplate."

* Note that these were commercial parties – perhaps a different result if residential lease.

CLASS NOTES – #14

RESTITUTION/QUASI-CONTRACT/QUANTUM MERUIT (“as much as he deserves”):

“Quasi-Contract”/Quantum Meruit (“implied” by law – legal fiction): the goal of this remedy is to prevent unjust enrichment by “disgorging” it; measure of recovery is not the harm to the P but, instead, the unjust benefit to the D → In caselaw, legal scholarship, and in popular meaning, “restitution” is a broader concept than quasi-contract – measure of harm is based on unjust enrichment or unjust impoverishment (e.g., criminal law “restitution” payment to victim)

Moses v. Macpherlan (English 1760) (Lord Mansfield) – **original case recognizing viability of “quasi-contract” action** – Macpherlan, D, fraudulently tricked Moses, P, into indorsing notes over to him; D falsely promised P that D would indemnify P and that no suit would ever be brought against P; D then turned around and sued P on the indorsements in small claims court, where D won because the court would not consider agreement. P then instituted this action (in equity court). Lord Mansfield held that, while no legal action (“assumpsit”) would lie in view of prior judgment of small claims court, an equitable action in “quasi ex contractu” would lie. Equity court required D to disgorge the benefit he unjustly obtained from P by fraud.

Kossian v. American National Ins. Co. (Calif. 1967) – D was the mortgagee (“deed of trust”) of property held by a man named Reichert. Fire destroyed a portion of the property. As condition of mortgage, property was insured. Part of insurance policy provided payment for clean up expenses after fire. Reichert, **unknown to D**, paid P to clean up after fire (for approx. \$18K). P did so. P did not file a mechanics lien on the property. Before P was paid, however, Reichert went bankrupt and his interest in the property and insurance proceeds went to D. D filed insurance claim for fire damage and specifically recovered insurance proceeds for clean-up costs. [Record is unclear how much the insurance co. paid for clean-up costs.] Undisputed that there was no privity between P and D. D did not induce – or even know about – P’s agreement with Reichert until after clean-up work performed. The key fact in this case is that D made an insurance claim for clean up costs. Ct. held that P is entitled – not as a matter of contract law but as a matter of restitution – to receive whatever insurance proceeds that D received for the costs of clean-up.

Seegers v. Sprague (Wisc. 1975) – P, sub-contractor, sued property owner, D. General contractor had contract with D. Property owner paid general, who did not pay sub for sub’s work on property owner’s property. D was aware that P was providing benefit to P; however, no direct contractual relationship between P and D. And, critically, D paid general contractor for work performed by sub, who in turn was contractually bound to pay D (but who did not). General not a party in this case – apparently unavailable. Ct. holds no “unjust enrichment” here for two reasons: (1) first and foremost, D paid general for work provided by P (no free ride here) [D’s only remedy is against general]; and (2) **no “independent” request** by D to P or “invitation” by D for P to perform work. RELIEF DENIED.

Banque Worms v. Bank America, Int’l (NY 1991) [on certified question from 2nd Circuit] mistaken electronic transfer of funds case – P bank mistakenly wired nearly \$2 million to D bank. P then sued for return of the money after D refused to return it. Ct. first notes **“traditional” rule** -- that mistaken

payment by a person to another based on the erroneous belief that the former is indebted to the latter requires latter to pay the money back, even if former paid it as a result of negligence, so long as latter did not detrimentally rely on payment. Ct. then notes **“modern” rule** as reflected in the Restatement of Restitution § 14– **“discharge of value” rule**. That rule provides that, at least where payment is made by one party to a second party/creditor on behalf of a third party/debtor, creditor need not repay money to first party, so long as creditor did not act inequitably (by misrepresentations) and did not, at the time of the mistaken payment, know that the first party was mistaken in its payment. “Discharge of value” rule is a cousin of the bona fide purchaser doctrine. Focusing on the need for **“FINALITY”** in the business transactions, Ct. holds that “discharge of value” rule applies to this case. Here the D bank did not know – at the time of the electronic transfer – that the \$ was erroneously wired. Nor did the D bank do anything inequitably. Rather, D bank applied wired money to a pre-existing debt owed by third party who had an account with P bank. Ct. notes that, if receiving bank did not apply all or part of the money toward a legitimate debt, the unused money would have to disgorged *pro tanto*.

Owen v. Tate (English 1974) – D took out a bank loan; P guaranteed the loan without being requesting to do by P. The loan was originally secured by P’s friend, Ms. Lightfoot. However, she wanted her deeds back from the bank. P was friend of Ms. Lightfoot, so he deposited money with bank – as security for loan – in return for deeds. D never requested this; indeed, D never even spoke to P about it. Subsequently, bank used funds deposited by P toward D’s loan. P then asked D for the money, which P refused. P sued for restitution. Ct. notes historic rule that a true “volunteer” cannot seek restitution. Ct. also notes rule that one person is “compelled” to pay a debt owed by another is entitled to restitution from the original debtor. Ct. holds that P here was a volunteer who acted “officiously.” P was not “compelled” to pay money to bank. NO RESTITUTION.

* Restatement (2d) Restitution sec. 2 – “officious” benefit – no restitution required when person who pays money does so without request from debtor nor as a result of reasonable mistake

Glenn v. Savage (Or. 1887) (Casebook, at page 672, Note 2) – When he was not around, D Savage’s building material fell into water. P Glenn saw it happen and jumped in the water and saved it from loss. No privity or relationship between 2 parties. Savage did not request this nor did he RATIFY it *post hoc* by promising to pay. Ct. denies P’s claim for restitution. Officious act by volunteer.

Cotnam v. Wisdom (Ark. 1907) (Note 3) – exception to “volunteer” rule for medical professionals who provide emergency medical care to unconscious person – rationale: unconscious person is incapable of contracting

Earhart v. William Low Co. (Cal. 1979) – P construction co. performed services at the request of D; however, D was not “directly” benefitted by P’s services. P and D entered into an agreement to develop a mobile home park. The agreement had the condition precedent that D had to obtain the requisite financing. At D’s request, P began working on third-party property – the proposed site of the trailer park -- based on D’s alleged claim that financing would be obtained. It turned out that financing didn’t happen. P then sued D – not the land owner – for restitution (value of P’s services). Ct. recognized that, traditionally, in order to have a viable claim in quasi-contract, there must be a “benefit” to “disgorge” from D. Here, D did not “directly” benefit; rather, third-party land-owner

did. However, ct. relies on former **Justice Traynor's** dissent in a prior case and related doctrine of "promissory estoppel" doctrine (Restatement (1st) of Contracts, § 90), and premises restitutionary damages on that equitable doctrine.

DISSENT: Contends that, in a case where P's services did not benefit D, *only if D promised to pay P* for benefit provided to third-party should P be entitled to recovery from D. Not the case here.

NOTE: ct. appears to award quasi-contract measure of damages (compensation for value of benefit) rather than traditional "promissory estoppel" measure of damages (cost of P's out-of-pocket expenses). DIFFERENT MEASURE OF DAMAGES.

* Three basic measures of \$ damages: "Expectation Interest" (lost net profits) vs. "Reliance Interest" (promissory estoppel) vs. "Restitution Interest" (quasi-contract)

MEASURE OF RESTITUTION INTEREST:

Olwell v. Nye & Nissen Co. (Wash. 1946) – For three-year period, D wrongly converted P's egg-washing machine to D's own uses without P's consent. Rather than sue in tort for conversion (which would have limited P's damages to rental value of machine for 3 years), P "waived" tort claim and "ELECTED" to sue in quantum meruit. P sought to disgorge benefit from D – including D's profits earned by using the machine (increased profits resulting from using machine rather than hand-washing process). Trial court awarded such damages (\$10 day x number of days used). D appealed, contending that measure of damages should be fair market rental value of machine (in effect, P's loss rather than D's gain). Appeals court held that, ***at least where D acts tortiously*** (as was the case here), P entitled to disgorge D's profit (measured in terms of savings to P resulting from use of machine). [Cf. CONSTRUCTIVE TRUST REMEDY]

Bradkin v. Leverton (NY 1970) (Fuld, C.J.) – P was employed by Federman Co. to find other corps. in need of financing. Under his contract with Federman, P was receive 10% of any refinancing. After learning that P had recruited a corp., D, an officer of Federman, arranged private refinancing for a corp. that P had recruited. D received benefit from recruited corp. P then sought 10% of D's profit. Because there had been no written contract between P and D (as opposed to between P and Federman), D moved to dismiss under S-O-F-. Trial court dismissed under S-O-F. On appeal, Court of Appeals held that S-O-F didn't apply because D's claim was really in quasi-contract – against D rather than against Federman -- and was not a legal action based on breach of contract. Ct. orders D to pay P the 10%.

Farash v. Sykes Datatronics, Inc. (NY 1983) – P, lessor, and D, putative lessee, entered into ORAL lease, whereby P was to make improvements on P's building before D moved in. P made such improvements, but D never moved in or paid any lease payments. P sued, but his cause of action for breach of contract was barred under the S-O-F. Issue is whether D may recover in quasi-contract or promissory estoppel as opposed to in contract. Although court holds that P can't sue in quasi-contract, since he didn't confer a benefit on D, but permits P to sue in promissory estoppel. Permits P to recover out-of-pocket expenses and "reasonable value of his performance rendered" IN REASONABLE RELIANCE ON D's ORAL PROMISE.

DISSENT: disagrees with application of promissory estoppel theory when no contract and no benefit to D

Oliver v. Campbell (Cal. 1954) (Casebook, at p. 688, Note 1) – D client retained P attorney for a divorce trial. Agreed to pay him \$750. Turns out trial went on for a month. Actual value of legal services was \$5,000. D breached contract after trial was over and only judgment was left to be entered and stated that he wanted to proceed *pro se*. P sued for restitution of \$5,000. Ct. limited him to remaining fees owed under the contract since no performance by D under the contract was left except payment for a definite sum of \$.

* **Restatement (2d) of Contracts sec. 374**: unless parties otherwise agree, if one party justifiable rescinds contract and refuses to perform his part of contract, breaching party may recover reliance interest or restitutionary interest in excess of the loss that he caused the non-breaching party.

Jersey City v. Hague (NJ 1955) – P, city; Ds, ex-city officials who extorted \$ from lower-level city employees over many years. Ds were fiduciaries who held positions of public trust. REMEDY here is RESTITUTIONARY DISGORGEMENT based on breach of fiduciary duty. CONSTRUCTIVE TRUST.

“GOOD-FAITH IMPROVERS”:

Somerville v. Jacobs (W. Va. 1969) – P, land owners who mistakenly but in good faith built structure on D’s neighboring lot. Co-P purchased structure from P. Ps sued in restitution to require D either to pay for building or convey land and building to Ps for reasonable value. D did nothing to lead P to do this. Totally P’s error, albeit in good faith (“reasonable mistake” based on surveyor’s error). *Evidence shows that D intended to keep and use building*. Prior to lot, D’s land worth only \$2K; after building, worth \$17.5K. Majority rules for Ps; grants their requested relief.

VIGOROUS DISSENT: “He who made the mistake must accept the hardship.” Dissent has an interesting remedy: give D option of paying for building, forced selling property to P, OR MAKING P PAY FOR REMOVAL OF PROPERTY FROM D’S LAND.

Shick v. Dearmore (Ark. 1969) – P, seller of lot; D, well-driller who mistakenly drilled well on P’s lot. P sued to enjoin D from placing a well-driller’s lien on P’s property and also to prevent D from destroying well (i.e., P wanted to use well). D counter-claimed for price of well. Ct. holds that, so long as it wouldn’t damage P’s land, D should be permitted to remove well so as to prevent unjust enrichment of P. Cites Bright v. Boyd (Justice Story, sitting as a chancellor). Ct. remands for a hearing on whether well can be removed without damage to P’s land.

DISSENT: would follow traditional common-law rule that provides that once a “permanent” fixture is erroneously placed on a person’s land, the land owner should get to keep the fixture at no expense

* Restatement of Restitution sec. 42 (Casebook, at pp. 3-4, Note 3): “reasonable” vs. unreasonable mistake

Paramount Film Distr. Corp. v. NY (NY 1972) – P’s restitutionary action for refund of license fees paid under a statute later declared to be unconstitutional – prior to ruling that statute was unconstitutional, fees had been paid “without protest” by P – licensing statute declared unconstitutional on a “procedural” due process ground – Ct. holds that payment of fee “not involuntary” and denies restitution. State acted in “good faith” in implementing statute later declared to be unconstitutional. State also did not put fees into general revenue fund. Instead, used to administer licensing scheme. No real “benefit” to State.

DISSENT: There was a state “benefit”; P was under “compulsion” to pay fees. Equitable thing to do is to reimburse fees.

CLASS NOTES #15

CONSTRUCTIVE TRUST/EQUITABLE LIEN – RESTITUTION REMEDIES (equitable means of preventing unjust enrichment):

- * “*cestui que* trust” (pronounced “cest/tweh” “kee” trust) – French term for equitable trust (as opposed to a legal trust)

- * constructive trust vs. equitable lien – difference is that D has “equitable title” to property in “trust,” while an equitable lien means that P has a right to make D sell property on which there is an equitable lien in order to satisfy a debt owed to P by D

- * constructive trust treats the D as if he were a real trustee of a legal trust; treats P as if he were the legal beneficiary – such a trust/lien attaches *only to the extent that the property is held by the D who owes the P restitution*

- * There must be a **NEXUS** between P’s claim for restitution and D’s property held in “equitable trust” or upon which an “equitable lien” is attached – see Restatement (2d) of Restitution, § 32 (Casebook, at pp. 705-06) – however, trust/lien interest will flow through to replacement property (Rest. § 33) (“**tracing**”)

- * related remedy of “**equitable assignment**” – specific application of a constructive trust – commonly used in intellectual property cases – e.g., P is not a legal holder of intellectual property but is equitable holder of it – D, legal holder, unjustly enriches self with patent, etc.; remedy would be to equitably assign patent (and any profits) back to P

- * related remedy of equitable “**subrogation**” – equitable remedy for a surety who pays a debtor’s debt owed to a creditor or who pays off an encumbrance on a person’s property – the surety (“subrogee”) is “subrogated” to the rights that the creditor/lien-holder had against the debtor/property owner and assumes the former lien holder/creditor’s rights in any security put up by the debtor (equitable assignment of security) – This equitable remedy does not apply to one who “**officiously**” pays the debt of a debtor (“volunteer”)

- * as a threshold matter, there must be an “**inadequate remedy at law**” – typically, D property holder has legal title to property, so legal action for replevin by P (who only has an equitable interest in the property) won’t work (e.g., thief of \$ buys property with stolen \$)

- * P “beneficiary” generally entitled to all PROFIT on trust *res* made by D “trustee”; however, if D loses money or value of trust *res*, then P may sue D personally for loss on “trust” (best of both worlds, assuming that D is not judgment-proof)

Beatty v. Guggenheim Exploration Corp. (NY 1919) (Cardozo, J.) (Casebook, at pp. 706-07): agent sent by mining company to Yukon to investigate mining claims; bought up options himself – court holds that when an employee of company seizes a business opportunity within the scope of his employment, employer may sue for restitution. Constructive trust created. Court requires D to

renounce profits of transaction and sell claims to employer at cost.

Snepp v. United States (US Sp. Ct. 1980): former CIA agent sued by US for divulging information (albeit not classified info.) that he gained in his former employment as agent in a book he published. Breach of his employment contract. US sought a constructive trust on all profits made from the book. Also sought injunction to require D to submit any future proposed publications to US for its pre-publication approval. Characterizing the former agent as having held an extreme position of trust – as opposed to having merely breached an ordinary employment contract -- the Court held that a constructive trust was an appropriate remedy here. Held that imminent harm to US (in that other nations would fear working with CIA) and inadequate remedy at law (actual damages to Gov't “unquantifiable” and punitive damages “speculative”). Ct. considers a constructive trust also to serve deterrent purpose in terms of potential future breaches by D.

DISSENT: constructive trust not appropriate remedy because the former agent did not divulge any confidential or classified information – holds that provision in employment contract (relating to *any* information gleaned during his employment) was too broad to enforce under “rule of reason” (cf. restrictive covenants in employment contracts). Also, First Amendment violation here (overbreadth & prior restraint); First Amendment must be factored into remedy analysis. There was no “unjust enrichment” to disgorge because, had former agent submitted his book for pre-publication review, CIA could only have limited classified/confidential information. Because none in book, his failure to submit for pre-publication clearance is harmless error. Remedy inappropriate. Finally, there is an adequate remedy at law (i.e., punitive damages).

Sharp v. Kosmalski (NY 1976): P, a simple-minded widower, was seduced by D, a much younger vixen. After D talked P into making her the beneficiary of his will and transferring his farm property to her *inter vivos*, she kicked him out without marrying him! (He continued to shower her with gifts, etc., transfer property, even after she refused to marry him. Idiot.) There was no express promise that D would marry P or that she would allow him to live on the property after the transfer. Trial court refused remedy of constructive trust after finding that there was no promise by D to allow P to continue to live on farm after transfer of property. Appellate court finds that, although no express promise existed, an “implied” promise may be inferred from the “CONFIDENTIAL RELATIONSHIP” that existed between the parties. Here, the record suggests that such a confidential relationship existed. Court remands for hearing on whether D's conduct after the transfer “abused” the confidential relationship. If so, then the court should create a “constructive trust” held by D for P's benefit. ***Ct: “This case seems to present the classic example of a situation where equity should intervene to scrutinize a transaction pregnant with opportunity for abuse and unfairness.”***

Dissent (4-3): no express or implied promise – constructive trust inappropriate remedy here

Simonds v. Simonds (NY 1978): example of a constructive trust imposed on an innocent party → P, decedent's 1st wife; D, decedent's 2nd wife and their daughter. Evidence showed that, when P and decedent divorced, he promised, as part of a “separation agreement,” to maintain a \$7,000 life insurance policy naming P as the beneficiary. Decedent specifically agreed that, if policy lapsed or was cancelled, decedent would take out a replacement policy. Original policy lapsed, and decedent

failed to take out replacement policy. Instead, he took out policy naming 2nd wife and daughter. After decedent's death, 1st wife sued to recover \$7,000 in proceeds from policy naming 2nd wife and daughter as beneficiaries. Theory of recovery was that 2nd wife held insurance proceeds in a constructive trust for P. Ct. held that constructive trust appropriate remedy here because 1st wife's "beneficial" (equitable) interest in insurance proceeds was superior to 2nd wife's "legal" interest in property. Remedy at law inadequate since decedent's estate was insolvent. Equitable Maxim: **"Equity regards as done that which should have been done."** 2nd Wife's "innocence" does not defeat remedy. "Unjust enrichment . . . does not require the performance of any wrongful act by the one enriched."

* Court notes traditional four criteria for constructive trust: (1) promise to P; (2) transfer of property in reliance thereon; (3) fiduciary or "confidential" relationship; and (4) unjust enrichment.

* Court notes that, a bona fide purchaser for value without knowledge, takes property free from constructive trust, while a gratuitous donee is subject to a constructive trust

* Joint & Several Liability issue: 1st wife did not go after daughter, only 2nd wife. That does not limit her to 50% recovery, however, because of J & S liability doctrine – 1st wife may collect the full \$7,000 from the 2nd wife's share of the insurance proceeds (no proration)

Perry v. Perry (Mo. 1972): As part of a divorce settlement, husband agreed to change the beneficiary on his insurance policies from his mother to his minor children. Husband failed to do so after divorce. (Grandma actually paid the insurance premium on one of the policies.) After he died and the proceeds went to grandma, she refused to give insurance proceeds to grandkids. Mother of grandkids sued grandma on kids' behalf, seeking to impose a constructive trust in the insurance proceeds. By time of trial, grandma had spent all the money, which she had deposited into her personal account – i.e., she "commingled" the "trust" funds with her own funds. [**P should have moved for a preliminary injunction to preserve status quo.**] Money couldn't be traced to specific property. Ct. holds that, notwithstanding inability to "trace" funds, a constructive trust should be imposed on grandma's bank accounts. Under the "commingling" doctrine, her mixing the "trust" funds and her private monies requires a court to presume that she spent her own money on personal expenses; any remaining money in her accounts is presumed to be trust funds. Moreover, the mere fact that she paid premiums on one of her son's policies doesn't entitle her those funds. The policy was owned by her son, not her. Ct. does reduce amount of the constructive trust *res* by the amount of premiums that she paid over the years.

* **Restatement of Restitution § 203** (Casebook, at p. 725) – where an innocent person "without notice" (not a BFPWN) converts the property of P and P has equitable interest in property after innocent conversion; if innocent converter then "without notice" exchanges the *res* for another property, then P's remedy is limited to an equitable lien in property but not a constructive trust in the second property – in other words, innocent converter permitted to reap any profit on exchange

* **COMMINGLING OF FUNDS** IN EQUITABLE TRUST -- Restatement of Restitution § 210: if trustee commingles trust funds and his own money and, with the "mingled" funds, acquires property, then the trust beneficiary is entitled to an equitable lien upon the property to secure the money owed

to him (assuming it is “traceable”)

* * * END OF 1st HALF OF COURSE (EQUITY) ***

NEW TOPIC: MEASURE OF LEGAL DAMAGES IN CONTRACT/TORT CASES

Hadley v. Baxendale (English 1854): famous **consequential damages** case – breach of contract case -- P, mill owner whose shaft broke; D, courier of shaft (to shaft manufacturer for repair). Because of D’s negligence, the delivery of the shaft to manufacturer was delayed, which resulted in lost business for P. P sued D for consequential damages -- namely, lost profits. Ct. held that such damages inappropriate under facts of this case.

* “Rule” of Hadley: unless the “special circumstances” regarding the contract (namely, the need for shaft to be promptly sent to manufacturer in order to be repaired and returned to P so that P’s mill could run) are communicated to the D or otherwise “in the contemplation of the parties,” D not liable for consequential damages. Ordinarily, D only liable for those potential damages that “in the ordinary course of events” and that are “REASONABLY FORESEEABLE” to D.

* “reasonable foreseeability” is an OBJECTIVE test (what a reasonable person would know to be “likely” to occur as a result of breach or “very substantial degree of probability”)

Note: Parties can always contract around consequential damages, even those within parties’ reasonable contemplation

H. Parsons Ltd. v. Uttley Ingham & Co. (English 1977): P, commercial pig farm; D, grain hopper manufacturer. As a result of D’s failure to open ventilator on grain hopper, P fed pigs mouldy pignuts. Pigs got sick and 254 pigs died. Lost profits resulted. P sued D for (1) value of dead pigs (10,000 pounds) and (2) lost profits (20-30,000 pounds). ??? Unclear from casebook’s partial opinion whether trial court awarded lost profits in addition to value of dead pigs. Citing Hadley, appellate court affirms, holding that D was “liable for the death of the pigs.” Unclear whether this means value of dead pigs and lost profits.

Lord Denning: draws a line in terms of remoteness-of-damage test between lost profits and physical loss – would require foreseeability of strong likelihood of economic loss vs. mere probability for physical loss

Lord Scarman disagrees with drawing line between two types of losses – it should be “serious” possibility of loss in any type of case

* concept of “economic loss” vs. physical (property or bodily) loss

*** Ct. notes “**line between contract and tort**. Remoteness [in damages] in contract depends on what the parties reasonably *contemplated* at the time of the contract, whereas in tort it depends on what could reasonably be *foreseen* at the time of the [commission of the tort].” —> “would contemplate” as a likelihood of breach (contract) vs. “would foresee” as possible (tort)

* U.S. cases on Hadley in contract vs. tort cases – many courts in this country hold that Hadley is limited to contract cases – yet there are cases like Evra Corp., *infra* (Posner, J.)

Hampton v. Fed-Ex (8th Cir. 1990) (Note, Casebook, at pp. 737-39): D, Fed-Ex, negligently failed to deliver blood samples of P's cancer-stricken son in need of bone marrow transplant. Shipping contract limited damages to \$100. In any event, because Fed-Ex did not know circumstances, it was not “reasonably foreseeable” under Hadley. No consequential damages.

Evra Corp. v. Swiss Bank Corp. (7th Cir. 1982) (Posner, J.): P, scrap metal exporter; D, bank. P had a separate shipping contract with a ship. Tort action. ***As a result of D bank's negligence***, P's payment to shipping co. was not received on time, which permitted shipping co. to cancel its contract with P. This was costly to P, since the shipping contract was originally executed when shipping costs much lower. P turned around and sued D – in tort, not contract, since there was no contract between P co. and D bank. P sued D for, *inter alia*, loss in profits resulting from higher shipping costs. Trial court awarded approximately \$2 million in lost profits from loss of original shipping contract. On appeal, 7th Cir. held that trial court erred by failing to apply Hadley's “reasonable foreseeability” limitation on consequential damages to this tort case (trial court erroneously assumed Hadley was only applicable to breach-of-contract cases). Under the facts of this case, D bank did not actually know, and was not reasonably on notice, that a late wire transfer would result in the shipping co.'s cancellation of the original shipping contract and, consequently, would require P to pay higher shipping costs (and, thus, suffer reduced profits)

* 7th Cir. distinguishes between “**direct**” (also called “**general**”) damages and “**consequential**” (also called “**special**”) damages [in this case, direct damages would be any loss directly caused by the bank's tardy wire transfer, e.g., lost interest on the funds prematurely taken out of account but not timely wired)

* Posner's “law & economics” discussion: Hadley's rule animated by economic principle that “the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so.” —> particular application for contract cases insofar as, for economically efficient bargaining, parties need to have complete information in order to set fair contract price. Without full information about relevant circumstances, D cannot be held liable for unforeseeable consequential damages because contract price (or transaction price) did not reflect it

* 7th Cir. notes the doctrinal relationship between Hadley and Palsgraff (D's “duty” of care in negligence tort case a function of the foreseeability of harm caused by D's negligence)

* “general” foreseeability vs. “specific” foreseeability – Hadley requires specific foreseeability

East River Steamship Corp. v. Transamerica Delaval, Inc. (US Sp. Ct. 1986): case within federal court's admiralty/maritime jurisdiction – P, oil co. who chartered supertankers to transport oil; D, manufacturer of turbines put in ships. (Ship-builder, charter co. not a party.) After P chartered ships, turbines failed, causing only “economic loss” (lost profits) to P. P sued D in products liability case. Other than economic loss, there was no other loss, save to damage to turbines themselves (not as if

entire ship engine damages; only defective part itself). US Sp Ct. rejects application of products liability tort theory here, “[w]hen a product injures only itself,” thus rejecting P’s right to consequential damages (i.e., economic loss) under a strict liability theory. Ct. holds that P must sue in contract for breach of warranty rather than for strict liability in tort. Thus, P must prove (1) privity; and (2) foreseeability.

* D would lose in privity action because: no privity between parties and, furthermore, P’s economic loss was not reasonably foreseeable to D here.

* Note that, in many jurisdictions, in a tort case involving foreseeable *physical injury* to person or property (non-economic loss), the measure of damages is whatever injuries proximately caused by D’s commission of tort, whether or not D foresaw the extent of such damages

CLASS NOTES # 16

BREACH-OF-CONTRACT DAMAGES:

Foreseeability:

Pipkin v. Thomas & Hill, Inc. (N.C. 1979): P, construction co./mortgagor; D, mortgagee. P sued D for breach of contract to make long-term loan that would have permitted P to pay off a short-term construction loan from another lender. After D breached, P was unable to secure another long-term loan at a comparable interest rate and, thus, had to secure a short-term loan at a much higher interest rate.

Ct. notes general measure of damages in this type of contract case (as stated in Restatement of Contracts, sec. 343): *cost of obtaining use of money during agreed period of loan, less interest rate provided in the contract, plus compensation for unavoidable harm that the defendant had reason to foresee.* P borrow has DUTY TO MITIGATE DAMAGES by attempting to obtain alternative source of financing. In this case, P sought damages based on much higher interest rate that P had to obtain to stave off foreclosure on original loan. D contended that this much higher interest rate was unforeseeable consequence of breach. Ct. disagrees. Here, D was fully aware of the purpose of P's loan. Long-term lender presumed to know that, if they back out shortly before other loan is due, it will be "well-nigh impossible" for borrower to secure another long-term loan on short notice. Ct. awards damages based on the full difference between the costs of the envisioned long-term loan and the short-term loan actually taken out by P.

"Expectation" or "Expectancy" Damages:

Wilson v. Hays (Tex. Civ. App. 1976): P, buyer of bricks; D, seller of bricks. Case governed by UCC. Oral contract to sell used bricks. Agreement to sell 600,000 used bricks for \$6,000 [1 cent per brick]. P paid \$6K in advance. D only delivered 400,000 bricks. Jury found that market price at time of breach was 5 cents per brick. Jury awarded \$10,000 plus net lost profits (\$6250 minus \$2605 in "expenses" resulting from breach, for a total of \$3645).

On appeal, the court reversed in part. P entitled to \$8,000 in direct damages – **difference between market price and contract price** (200,000 bricks x 4 cents (difference in contract price and market price)) plus \$2,000 that was overpaid to D by P. With respect to consequential damages/lost profits, Ct. reverses \$3645 net lost profits award because no evidence in record that P sought to "cover." *In order to recover consequential damages, P must have sought in good faith to "cover."*

* QUESTION FOR CLASS: Why didn't statute of frauds apply to this case (oral agreement for sale of goods over \$500)? Answer: partial performance (P paid purchase price in advance). D probably didn't even invoke it as an affirmative defense.

Neri v. Retail Marine Corp. (NY 1872): P, buyer of boat; D, seller of boat. P sued D for recovery of deposit on boat; D counter-claimed for lost profits based on breach of contract and for "incidental"

damages. UCC governs. P tried to back out of contract based on purported “impossibility” (his hospitalization), which court rejected. Court accepts P’s counter-claim. D “covered” by selling the boat to another customer for same price. D contended that he was entitled to lost profits because it would have sold 2 boats but for P’s breach. Trial court rejected D’s counter-claim for lost profits. Appellate court reverses. Under UCC, a retailer is entitled to lost net profits if contract involved a “standard priced good,” even if seller sold good identified in contract to different buyer. Boat deemed to be a “standard priced good.” Here lost net profit is \$2,579. Court also awards “incidental damages” of \$674 based on D’s storage costs & insurance on boat in connection with resale. Court offsets P’s recovery of \$4250 deposit by these amounts due to D.

* Texas cases refer to this as a “lost volume seller” [Texas presentation]

* NET lost profits

* “incidental damages” – UCC definition sec. 2-710, quoted in Casebook, at p. 758 n.3

Bumann v. Maurer (N.D. 1972): P sued D for breach of real estate contract. By time of lawsuit, property had been conveyed; P’s only damages concerned the DELAY in the conveyance. Ct. held that the property measure of damages was “the value of the use of the property for the time of such [wrongful] occupation . . . and the costs, if any, of recovering possession.” Two, alternative ways of measuring “value” of property during time of wrongful possession: (1) fair market rental value of land during time that D wrongly possessed it; or (2) unjust enrichment value of fruits of D’s wrongful use of property.

Ct. next addresses trial court’s jury instruction’s regarding P’s request for “special [i.e., consequential] damages,” i.e., (1) cost of moving to a different property during D’s wrongful occupation of contracted property and expenses of that property; (2) additional school transportation expenses; (3) extra school tuition paid. Ct. held that such “special damages” could only be recovered if jury was instructed on foreseeability limitation in Hadley v. Baxendale.

* Court notes that a plaintiff cannot recover both “general” and “special damages” to the extent that they overlap – purpose of damages in a contract case is to make plaintiff whole (NO DOUBLE RECOVERY)

P’s Duty to Mitigate Damages, Where Reasonable:

F. Enterprises, Inc., plaintiff-appellee v. KFC, defendant-appellant (Ohio 1976): P, prospective lessor of commercial real estate who held an option to purchase the real estate; D, breaching prospective lessee, who was to lease roughly ½ of P’s land after he exercised the option. Contract was for a 20-year lease. One of the provisions of the lease was that P would erect a building on the leased land at a cost not to exceed \$40K. Prior to P exercising option, D repudiated the contract. P nevertheless exercised option to purchase real estate.

Ordinarily, in this type of case, the damages measure is difference between the contractual lease amount and the fair market rental value (FMRV), plus any consequential or “special” damages. FMRV of property with proposed building would have been \$9K; FMRV without building was approx. \$4K. Trial court deducted from difference between contract lease amount (\$13K per year)

and FMRV of improved land (\$9K) [i.e., \$4K] the “interest income” on the unexpended \$40K that P did not spend to erect the building [i.e., \$2,400 per year], and multiplied that amount times 20 years and then reduced it to its present value.

On appeal, D contended that P did not mitigate damages because P exercised the option after the breach. D contended that, if P had not exercised option, then no damages would have resulted to D. The appellate court disagreed on the ground that, if P had not exercised option, the amount of P’s damages would have been even higher because the interest income on the unexpended money (for purchase of land and cost of building) would have been much less than the FMRV of the hypothetical property-with-the-building (used to calculate amount of damages). Furthermore, P’s damages would also arguably include lost profit on other half of land. Thus, D would have been required to pay even more damages to make P whole.

* had there been no breach, P would have made \$13K per year on an \$82.5K investment – goal of contract damages is to “make the plaintiff whole”

3 different possible damages measures:

OPTION 1 [if P did not exercise option]: P’s interest income (at 6%) on unexpended \$82.5K (\$42.5K on land and \$40K on building), which would be \$5K per year [x 20 years and reduced to present value]; *however, Ps would still be entitled to difference between contract lease amount and this amount, or **\$8K per year in damages**; moreover, P would also be entitled to profit on other ½ of unimproved land that was the subject of the option [by far, largest amount of damages for D to pay]*

OPTION 2 [if P had exercised option, but did not erect building – which is what P actually did]: By partially “covering” after breach, P would have received FMRV on unimproved property (\$4K) + interest income on unexpended \$40K for building (\$2.4K), which would have equaled \$6.4K. P would still have been entitled to difference between that and contract price (\$13K), i.e., **\$6.6K per year in damages**

OPTION 3 [if P had exercised option and built building]: FMRV (\$9K) —> this would have resulted from P’s complete “covering” after breach. P would still have been entitled to difference between FMRV and contract price, i.e., **\$4K more per year [smallest amount of damages for D to pay]**

* In this case, trial court based damages on 3rd option, which required D to pay the least amount of damages. Thus, ironically, for D, his claim that P failed to “mitigate” damages by refusing to exercise option was totally backwards. Had P not exercised option, P would have “aggravated” damages.

In dicta – since appellee did not cross-appeal – the court also noted that the trial court erred (actually benefitting D) by reducing the expectation damages amount by the “interest income” on the \$40K. The court reasoned that, trial court’s formula gave D benefit of a higher FMRV by factoring in \$40K as if it had been spent on building, and then also giving D benefit of reducing expectation damage award by interest on the \$40K (as if it had not been spent). However, because

P did not cross-appeal, court did not correct this error benefitting plaintiff-appellee.

- * doctrine of “avoidable consequences” and related doctrine of mitigation of damages [rationale: contract damages are supposed to place P in same position as he would have been but for the D’s breach, yet P must act in a manner that does not aggravate damages]

- * concept of “PRESENT VALUE” damages in long-term damages cases [compare lottery winnings]

Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc. (Tex. 1997): Evidence is that, after D breached lease, P did not make reasonable attempt to re-lease property. Ct. holds that a landlord has a duty to mitigate damages when a tenant engages in an anticipatory breach of a lease—rejecting the traditional rule is that a landlord did NOT have duty to attempt to mitigate damages by reasonably attempting to re-lease property. Traditional rule based on antiquated notion that a lease is an “estate” in property rather than a contract. Treating lease as more of a contract than an “estate” and also recognizing the “public policy” against economic “waste,” the ct. holds that, at least where there is an anticipatory breach or where lessee relinquishes possession of property to P, the P has a duty to mitigate damages.

- * *Objective test regarding reasonableness of P’s efforts at mitigation*

- * *Burden on D to show that P did not reasonably attempt to mitigate damages – P need not affirmatively plead it as part of cause of action*

- * *Ct. recognizes that parties may contract around this duty to mitigate damages*

Shirley MacClaine Parker v. Twentieth Century-Fox Film Corp. (NY 1970): P, actress Shirley MacClaine; D, 20th Century Fox. After the parties entered into an executory contract whereby P was to star in the lead role in musical movie “Bloomer Girl,” D anticipatorily breached the contract. D offered P another movie role, in a non-musical called, “Big Country, Big Man.” Offer was for same amount of money. P turned down second movie role. At P’s trial, court awarded P the contract price for the original movie, i.e., \$750K, after granting P’s motion for summary judgment. D appealed, contending that P failed to mitigate damages by refusing role in second movie. Ct. notes standard governing an employee’s duty to mitigate damages – employee must accept “comparable” or “substantially similar” employment. However, employee under no duty to accept an “inferior” or “different” job. Majority concluded that second movie deal was “different” and “inferior” because it was a non-musical, where D’s singing and dancing talents would not be show-cased.

DISSENT: Trial court should not have granted summary judgment for P (as a matter of law) on issue of whether second movie offer was “inferior” employment; this is a factual issue for the jury.

Indiana State Symphony Society, Inc. v. Ziedonis (Ind. 1976): P, violinist; D, symphony. P sued D when he was wrongly discharged in violation of employment contract. Trial court awarded D \$6,335 in damages. On appeal, D contends that P’s damages must be reduced by \$3,430, i.e., the money he

earned with other symphonies during the remaining time in his employment contract with P. Majority of court (as reflected in Judge Buchanan's "concurring-in-result" opinion) holds that P had the burden of proving that the money he earned with other symphonies was "**net**" **profit** (i.e., profit after his expenses). No proof offered in this case by P about what his expenses were related to those earnings. Thus, majority reduces damages by the entire \$3,430. "Dissent" by Judge White stated that, while it is generally the burden of a defendant to prove that the plaintiff mitigated his damages (or failed to reasonably do so), the majority erred by requiring *the plaintiff* to prove that expenses offset some or all of the money he earned elsewhere.

* weird breakdown of votes here – writer of purported "majority" opinion actually dissents on an issue and concurring justices actually state the "majority" holding

Appalachian Power Co. v. John Stewart Walker, Inc. (Va. 1974): contract between P, real estate developer, and D, electric co., whereby D was to install underground electric power service on lots being developed by P. D breached contract. With respect to damages, the P's evidence showed that the lack of underground power service reduced value of lots by \$8K. D's evidence showed that the cost of installation would have been \$3.5K. P sought damages based on "value" of electrical service; D contended damages should be based on the "cost" of the installation of the service. Ct. holds that, whether the "cost" formula or "value" formula will apply to damages measure "will depend on the facts and circumstances of the particular case." —> "**The test [in determining which to apply] is the nature of the motivation which induced the promisee [the plaintiff] to make the contract.**" If the P's motivation was the added value (in terms of the sales price of his lots), then the "value" formulation will apply. This test is consistent with the purpose of contract damages, which is to make the plaintiff "whole" by putting him in the position he would have been but for the defendant's breach of the contract. Here, the undisputed evidence was that P wanted the electrical service for the increased value of the lots (in terms of their market value). Thus, ct. applies "value" approach.

* sometimes cost formula yields greater damages (in terms of what D has to pay); sometimes value formula yields greater damages

QUESTION: Example of "cost" formula being more appropriate than "value" formula? Where D does not intend to sell item and (as discussed below) where costs of remedying defect or complying with contract would not be "disproportionate"

Measure of Damages when Breach of Construction Contract:

Eastlake Constr. Co. v. Hess (Wash. 1984): P, builder; D, property owner. After parties got into a dispute over P's work on residence built for D, P refused to complete construction and D refused to pay all of contract price. P sued for balance due; D counter-claimed for breach of contract. Trial court found against P on his claim and for D on counter-claim. Variety of damages awarded – cost of completing construction, reasonable rental value for delay between contracted move-in date and D's actual move; reasonable cost of unfinished specifics; reasonable costs of repairing/replacing certain defects (roof, etc.). However, trial court denied damages for certain specific, minor things not in compliance with contract (e.g., wrong size insulation, etc.). Trial court found that these things were not "substantial" breaches. Trial court also denied replacement value for kitchen cabinets,

finding it would constitute “economic waste” to require them to be torn up and replaced. Trial court awarded deficiency damages instead.

On appeal to the state supreme court, the court discussed different measure of damages: (1) cost of remedying non-conforming defects vs. (2) difference between value of conforming and non-conforming aspect of building. If the repair/replacement cost is CLEARLY DISPROPORTIONATE to the **value** of the repair/replacement. If proportionate, then cost of remedying is appropriate damages measure (*even if “economic waste” would result*). If disproportionate, then the diminished value is the appropriate measure. This “clearly disproportionate” test is set forth in the Restatement of Contracts § 348. Ct. vacates and remands to trial court to apply this test.

Bellizzi v. Huntley Estates, Inc. (NY 1957): P, home buyer; D, real estate developer/builder. Because of defective construction, P was unable to use his driveway because of a 22 ½% grade. This could have been easily avoided had D excavated the large rock on which D build the driveway. Trial court awarded damages based on repair costs rather than on diminished market value. Ordinarily, in construction contract cases, damages are based on diminished value. However, where defect causes portion of property to be UNUSABLE or UNSAFE, plaintiff is entitled to damages based on replacement/repair cost (even if it results in “economic waste”).

“Certainty” Damages Limitation:

United Virginia Bank v. Dick Herriman Ford, Inc. (Va. 1974): P, bank; D, car dealer. D breached contract with bank to record “first lien” in favor of bank with respect to car sold by D to a customer, which was financed by the bank. Bank unable to repossess car when customer defaulted. Trial court found breach but denied damages award because, as it held, P had failed to offer any proof that the automobile (i.e., the loan collateral) was worth anything *at time that the right to repossession accrued*. ***On appeal, court held that relevant point in time for damages determination is time of D’s breach*** – not later time. Thus, damages are to be determined by value of car at time of purchase of car/financing (offset by customer’s payments to bank prior to default).

Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin (Conn. 1998): legal malpractice action – P, failed unestablished business; D, law firm. D committed malpractice by failing to give P proper legal advice regarding state registration laws. Resulted in P’s unestablished business failing (state commission issued cease & desist order shutting it down). P sued for, *inter alia*, lost profits damages. Trial court awarded nearly \$16 million damages for lost profits over 12 years. Issue on appeal was whether P proved lost profits to a “REASONABLE CERTAINTY.” Traditionally, the “new business rule” prohibited an unestablished, nascent business from recovering damages for future lost profits. Over time, this rule gave way to a special application of the general “reasonable certainty” rule that applies to damages claims generally. New businesses have a heavier burden for proving lost profits than established businesses. In instant case, the appellate court holds that P failed to prove damages. Critically, at time of malpractice, P’s business in poor condition. Evidence showed that P’s prospects for future profits were “questionable.” SPECULATIVE DAMAGES BASED ON ASSUMPTIONS NOT SUFFICIENTLY SUPPORTED BY THE RECORD. Ct. specifically critical of 12-year time period relied on by court. Not a “reasonable time period” based

on record in this case. Trial court's damages award vacated on appeal.

- * in determining potential for future profits, courts (with help of expert witnesses) may look to past & subsequent experiences of same/similar businesses

- * party's PRELITIGATION PROJECTIONS of future profits also probative

- * Appellate court notes standard of review on appeal with respect to damages award – “clearly erroneous,” “abuse-of-discretion,” etc. – generally very deferential (generally treated as a factual finding)

Unabsorbed Overhead Damages:

Fairfax County Redevelopment & Housing Authority v. Worcester Bros. Co. (Va. 1999): overhead damages case – P, general construction contractor; D, local gov't authority. D unduly delayed for 98 days in having P undertake its contractual duties. P sued for additional overheard expenses resulting from D's delay. Trial court found that, because of D's delay, P was unable to obtain other work during period of delay. P's employees devoted to D's project were on “stand-by” as a result of contract with D. As a result, trial court found that P was entitled to damages for its “unabsorbed overhead” related to the delay. The trial court applied to the Federal Circuit's “Eichleay formula” (E.F.) for determining overhead damages. Appeals court affirms, holding that the E.F. is a valid mathematical method of prorating a contractor's total overheard expenses for a particular contract.

- * “Eichleay formula” applied by some Texas trial courts, but not yet approved or rejected by a Texas appellate court in a published opinion – adopted by many other federal and state courts

*** IN A CASE INVOLVING A COMPLEX DAMAGES ISSUE, RETAIN AN ECONOMICS EXPERT WITNESS

CLASS NOTES # 17

CONTRACT DAMAGES con't:

“Reliance” Damages:

Sullivan v. O'Connor (Mass. 1973): medical malpractice case brought as a breach of contract claim – P, patient who is a professional entertainer; D, plastic surgeon who screwed up P's nose job. P sued for damages based on her “consciousness” of her disfigurement and the effect on her mind, considering the nature of her business. [P did not sue for lost future earnings as consequential damages.] D objected to damages above P's out-of-pocket expenses, i.e., cost of operation.

Ct. notes potential damages here could be true “expectancy” damages (i.e., value of what P's nose would have been worth had operation been successful versus value of disfigured nose). Better approach is a “reliance” damages measure – i.e., place P back to *status quo ante*. This measure of damages would include her “wasted” pain & suffering caused by D's breach of promise.

* Note difference between restoration of *status quo ante* (reliance interest) and expectancy damages (value of what was promised but what did not materialize or value, i.e., damages intended to place P in position that she would have been “but for” the D's breach)

* broad concept of “reliance” damages – traditionally, only out-of-pocket

* Fuller & Purdue's famous law review article, *The Reliance Interest in Contract Damages*

Nominal Damages:

Freund v. Washington Square Press (NY 1974): P, author/university prof.; D, publishing co. D failed to publish book as agreed. Lower courts awarded, as compensatory damages, the amount of \$ that it would have cost P to self-publish. On appeal, court reverses, holding that cost of self-publishing too great an amount of damages. No relation to P's actual loss. Lower court erred by treating contract as if D agreed to supply books to P. Not so. No “reliance” damages incurred by P. *Note*: D did not allege damages based on lost opportunity to gain professional recognition for book [which would be subject to *Hadley* limitation]. P could not prove lost profits (i.e., royalties) with sufficient certainty – not as if he was a famous author with a proven track record for making a profit on books. (Moreover, P got an advance.) Thus, only 6 cents in NOMINAL DAMAGES awarded!

* Would be a different case if P entered into to contract with D *prior to* writing book – reliance damages in that case

Emotional Distress:

B & M Homes, Inc. v. Hogan (Ala. 1979): P, home buyer; D, home builder. Issue is whether, in a breach of contract/warranty for new home, the buyer may sue builder for “mental anguish” as

consequential damages. Ct. notes that, *ordinarily*, mental anguish damages not recoverable for breach of contract. Some exceptions exist, including for breach of home contract/warrant, particularly in a new home. Reasonably foreseeable to builder that breach of contract will cause mental anguish to buyer. No need for P to prove “physical manifestations” of mental anguish.

* As Note 1, Casebook, at p. 815 demonstrates, the courts are split on whether home buyer may recover contract damages for mental anguish. B & M Homes appears to be minority position. Most courts limit contractual damages for mental anguish to cases like breaches by funeral service providers – “**personal**” contracts.

Valentine v. General American Credit, Inc. (Mich. 1984): P sued D for breach of employment contract. P sought damages for mental anguish, alleging that her feelings about “job security” and peace of mind associated with job security made the employment contract a “personal” contract where a breach entitled to plaintiff to damages for mental anguish. P cites Hadley and states that it is reasonable foreseeable to an employer that his breach of an employment contract will cause mental anguish to employee. Ct. rejects this. Only where contract is primarily “personal” in nature (e.g., involving birth or death services) rather than primarily “economic” in nature will mental anguish damages be recoverable. Employment contract is primarily economic; its personal quality -- “psychic satisfaction” to employee -- is secondary. Moreover, mental anguish damages should not be permitted where there is a “market standard” by which damages can be measured according to terms of contract. Where there is a breach of employment contract, court may look to terms of contract and market in determining damages.

* Court notes Professor Dobbs’ *Remedies* hornbook/treatise and quotes from his criticism of Hadley’s foreseeability standard as meaningless re: mental anguish damages – in that virtually all breached contracts causing monetary loss will cause breached party mental anguish

Liquidated Damages:

* Key issue in deciding whether courts will enforce a liquidated damages clause is whether the liquidated damages are reasonably related to breach or, instead, are an improper “penalty”

Truck Rent-a-Center, Inc. v. Puritan Farms 2nd, Inc. (NY 1977): breach of 7-year truck lease agreement – P, lessor of commercial milk trucks; D, lessee of trucks. Liquidated damages provision in lease whereby lessee required to pay 50% of remaining lease payments in event of breach. Boilerplate language in lease. Rather than exercising option to buy trucks, D terminated lease after 3rd year of 7-year lease, claiming that P had not kept rental trucks in proper repair. D counter-claimed for return of lease deposit. After D returned rental trucks, P could not re-lease most of the trucks (milk home delivery business “on decline”). Trial court found that P had substantially performed its obligation under lease and that D was in breach. Trial court enforced liquidated damages provision as “reasonable” and as representing a fair estimate of actual damages, which would be difficult to determine with precision, trial court held.

On appeal, court affirmed trial court, after finding that the liquidated damages provision was reasonable – not a “penalty” or “forfeiture” and not “grossly disproportionate” to likely actual

damages, which were uncertain as of date that parties entered into contract. Ct. notes that, because there was some uncertainty regarding potential damages, liquidated damages was proper and enforceable. Fact that D could have exercised buy-out option for half of liquidated damages doesn't make it invalid. Nor does fact that it was "boilerplate" provision; no evidence that P had undue superior bargaining power over D.

* UCC § 2-718 & Restatement (2d) of Contracts § 356 on liquidated damages: must be "reasonable in light of the anticipated or actual loss caused by breach" and also in light of "difficulties of proof of loss."

* Courts split on whether, in determining reasonableness, courts may employ an alternative "retroactive" approach (i.e., looking at relation between actual damages at time of breach and liquidated damages), or are limited to purely "prospective" approach (i.e., looking at whether, *at the time the parties entered into the contract*, the prospective damages at that point bear a reasonable relation to the liquidated damages).

Mandle v. Owens (Ind. 1975) (Note 2, Casebook, at pp. 822-23): D breached land sales contract for purchase of P's house for \$30K. P "covered" by selling house for \$27K and then sued D for the difference (\$3K). D attempted to rely on purported liquidated damages clause in order to avoid much larger damages for breach-of-contract. Court rejected D's attempt to do so because the purported LD clause – a \$300 forfeiture of earnest money -- bore no reasonable relation to anticipated loss and, thus, was an unenforceable "penalty" provision that did not preclude damages.

Note: Other courts have reached contrary results. See, e.g., Palmer v. Hayes, 892 P.2d 1059 (Utah App. 1995) (holding that, once seller keeps earnest money deposit following buyer's breach, seller is treated as have elected to keep liquidated damages and is foreclosed from seeking expectancy damages).

Note: Rubenstein case, *supra*, where court held that non-breaching party had choice of remedies between specific performance and liquidated damages clause ("election of remedies"). Have courts also held that P has a choice between LD clause and contract damages? YES. Non-breaching party has choice to terminate contract and recover liquidated damages *or* elect to continue contract and sue for loss caused by breach (NY leading jurisdiction here). Key is that no double recovery allowed.

Board of Trustees v. Wood (5th Cir. 1986) (Note 3): 5th Cir. upheld \$5K per year liquidated damages clause for a state medical school graduate's breach of promise to work in small Mississippi community in exchange for favorable loan terms. Ct. held that it was "inherently difficult" to determine loss in event of breach at time parties entered into contract. Upheld LD clause as a "crude" yet enforceable remedy.

MEASURE OF DAMAGES FOR TORTS:

* **deterrent component** of tort law (virtually absent from contract law, which has to sole goal of making a plaintiff "whole")

Injury to Property:

Portland General Electric Co. v. Taber (Ore. 1997): P, power co.; D, driver whose car ran into a 60-year old utility pole. Issue on appeal was whether the proper measure of damages was: (i) remaining undepreciated value of the damaged pole or (ii) the full replacement cost of the damaged pole.

D claimed that, under undepreciated method, pole was worth \$0 because, for tax purposes, P depreciated their poles over the average life of pole (37 years). Some poles have much longer life. Trial court applied undepreciated method.

On appeal, court first noted that basic premise of tort damages is to award P with what P is entitled to receive but also consider what would be just to make D pay [cf. reliance interest and restitutionary interest]. Court also noted that traditional property damages measure in tort case looks to difference between FMV of property before and after the injury. Where property is totally destroyed, the damages measure is generally the FMV of the destroyed property. Here, however, there is no “market value” for old utility poles. D contended that to award replacement value would overcompensate provide “windfall” to P. P contended that, since no way to know actual life of a pole, only fair to award full replacement value. Ct. recognizes merit in both parties’ positions – under- or overcompensation – but goes with undepreciated method. Ct. looks **systemically** at this issue. Looking at the many thousands of poles out there, this method is the most just measure of damages.

* court notes that jurisdictions are split on this issue – undepreciated method is “minority” position

Averett v. Shircliff (Va. 1977): D’s car hit P’s car. D admitted liability; only issue was proper measure of damages. Issue is what is the proper measure of damages when the plaintiff’s personal property injured but not destroyed. Trial court instructed jury that measure of damages was difference between value of car before and after accident *with the “exception”* that, if the car could be restored to its original condition through repairs and such repair costs would be less than diminution of value caused by injury, the damages were such repair costs plus any diminution in value notwithstanding repairs. Following this instruction, jury returned \$4K damages (repair costs). P contended that trial court erred with this “exception” clause. Invoking the Restatement approach, P contended that he could “elect” such an alternate measure of damages, but that it should not have been submitted over his objection. In its post-trial order, Trial court agreed and awarded damages based on difference in value before and after accident (\$8K). Defendant then appealed.

On appeal, court reversed trial court and reinstated jury verdict. Found that trial court’s instruction was the “majority” rule. Better for jury to “elect” damages measure than P. Rejects Restatement’s “plaintiff’s election” option.

* Court also permits recovery for **“loss-of-use” damages** and damages to personal property inside car

*** NOTE: if you get in a car accident and it’s not your fault, don’t accept insurance check for cost of repairs. Seek additional money for diminution of value even after repairs [AutoNation or CarMax would decrease value after repairs] – also, be sure to get rental car paid for

Kaplan v. City of Winston-Salem (NC 1974): D tortiously damaged P's goods in stock for future retail sale. Issue is what is proper measure of damages when a retailer's stock of merchandise is injured – retail FMV or wholesale FMV? That is, should P get to recover its lost (retail) profit on items. Trial court in this case permitted recovery based on retail value. Majority of appellate court agreed. Dissent contended that, where property damaged is a “stock of goods held for retail sale,” measure of damages should be wholesale value of damaged goods plus cost of replacing/restocking them. Dissent contended that awarding retail profit margin was “unjust” because retail profit factors in overhead, employee costs, etc. – costs not incurred when goods in stock are destroyed.

* Isn't dissent correct?

Matter of Rothko's Estate (NY 1977): P, famous deceased painter's daughter; Ds, executors of his estate. Breach of trust action. Ds sold paintings for prices well below their value and sold them to parties with whom Ds shared interest – malfeasance than mere negligence in selling paintings for too low a price. Trial court awarded damages based on difference in value between actual value and amount for which Ds sold paintings. Issue is whether difference in value should look to difference at time of lawsuit or difference at time of tort. Ct. holds that, if Ds “merely” had sold paintings for too low a price, the relevant point in time would be time of sale. However, because Ds acted with bad intent in selling paintings, relevant point in time is time of lawsuit.

* **Restatement (2d) of Torts** provides that, where a defendant tortiously converts a “commodity” of “fluxuating value,” which is customarily traded on an exchange, plaintiff may recover FMV of the commodity which would be “the highest replacement value” of the converted item within a “reasonable period during which [the plaintiff] might have replaced it” following the conversion

Varjabedian v. City of Madera (Cal. 1977): P, property owner of 80-acre vineyard; D, sewage treatment plant. P sued for nuisance. P sought to recover not only damages for permanent diminution in property's value caused by continuing nuisance and for personal discomfort, but also “special” (i.e., consequential) damages for cost of refinancing loan which they would lose by vacating property. Jury awarded all three types of damages. Variety of damages issues on appeal. Key issue appears to be the consequential damages issue. Ct. affirms consequential damages award even though clearly it would not satisfy Hadley in that these special damages clearly unforeseeable to D [Contrast Judge Posner's decision in Evra Corp., supra].

* Case also stands for proposition that a property can recover for “inverse condemnation” claim based on gov't's nuisance (here, sewage plant's odors; need not be physical trespass)

??? WHAT WAS EDITOR'S PURPOSE IN INCLUDING THIS CASE IN BOOK?

* Restatement (2d) of Torts, § 929: Harm to Land from “Past Invasions” – damages are essentially same as Restatement approach to damage to personal property (i.e., plaintiff's election between difference in FMV or cost of repairs, plus loss of use of land & any discomfort/annoyance). With respect to “future invasions,” provided for past and future damages when injunction not permitted because of “public interest” (e.g., Boomer)

J'Aire Corp. v. Gregory (Cal. 1979) (**Bird, C.J.**): P, lessee of commercial property owned by a non-party. D, general contractor hired by non-party owner to renovate leased premises. Because of D's undue delay, P lost profits because P could not run its restaurant. P repeatedly requested D to finish the project on time, but D failed to do so. P sued in tort for D's negligence (also sued as third-party beneficiary, yet that theory not at issue here). Trial court dismissed complaint. Calif. Sp. Ct., in addressing P's tort claim, finds that because of "special relationship" between P and D (even though no contractual privity), D did owe P a duty of care and, thus, was liable for "**negligent interference with prospective economic advantage**." Ct. holds that "economic loss" recoverable here where loss was reasonably foreseeable. Remands for trial.

* "special relationship" line of cases – exception to traditional rule that mere "economic loss" damages cannot be recovered for mere negligence (must be physical/property injury, too)

People Express Airlines, Inc. v. Consolidated Rail Corp. (NJ 1985): similar issue to last case – whether a plaintiff may recover pure "economic loss" based on D's negligent interference with P's business. P, commercial airline which lost business due to evacuation of its business premises caused by D's negligent spilling of toxic chemicals. No physical or property injury; only economic loss.

Ct. notes traditional rule that damages for economic loss could not be recovered in simple negligence action. Ct. holds that it is "illogical" to limit damages to physical/property damages. Ct. holds that better limitation is foreseeability as it relates both the the DUTY and PROXIMATE CAUSE elements of negligence tort. Ct. notes various exceptions (e.g., "special relationship") to traditional rule against recovery of economic loss damages for mere negligence. Ct. abolishes old *per se* rule and its exceptions and, instead, holds that REASONABLE FORESEEABILITY IS THE KEY "as it relates to both duty and proximate cause." Defendant need not know particular plaintiffs, so long as P's "class" was reasonably foreseeable victim of D's negligence. "[T]he extent of liability and the degree of foreseeability stand in direct proportion to one another."

*** *Note*: J'Aire and People Express are the MINORITY RULE. Majority approach requires *intentional* conduct by D or physical damage (to person or property) before "economic loss" damages may be awarded in tort cases. Texas courts have rejected them. See, e.g., Coastal Conduit & Ditching v. Noram Energy Corp., 29 S.W.3d 282, 288 (Tex.App.–Houston [14th] 2000).

Injury to the Person:

Cunningham v. Harrison (English 1973): P seriously injured by D's negligence in car collision. P totally disabled. P's wife had to do everything for P after accident. P's wife killed herself shortly before trial. At that time, P's life expectancy was still 12 years. P was difficult, to say the least. P's "strong" personality – "very autocratic and talkative man." His personality made him unsuited for a nursing home. Ct. recognized that, "[f]or his own sake [as well as for nursing home], it would be better for him to be on his own." P thus sued for damages that would permit him to buy a home and pay for his medical and living expenses (which were much more than what nursing home would have cost). P can get free medical/nursing home care under socialist medical care system.

Denning, M.R. (court's opinion): With respect to plaintiff's medical/special living expenses, should P be limited to expenses of nursing home, or should he get costs of his own home and special medical/living expenses? Ct. rejects his request for damages that would permit him to have his own home. Limits him to typical damages for such an injured plaintiff. In effect, ct. rejects "egg-shell plaintiff" rule regarding his plaintiff.

*Ct. seems to apply *Hadley* limitation. What if D had known of P's unique traits?

* Ct. focuses on fact that socialist system will give him free care anyway. Contrast U.S. "collateral source rule"

QUESTION FOR CLASS: Anyone disagree? Should injured plaintiff's peculiar personality traits factor into it?

* Note that the damages awarded to P at trial – 33,250 pounds (approx. \$50K) was the "highest award known for this kind of damage" in England in early 1970s. Contrast U.S. verdicts!

CLASS NOTES #18

Tort Damages for Personal Injuries, con't ...

Pain & Suffering/Mental Anguish:

Hagerty v. L & L Marine Services, Inc. (5th Cir. 1986) (Reavley): “cancerphobia” case – Jones Act claim – P, a tankerman on a barge, was accidentally soaked with toxic chemicals known to cause cancer while doing his duty as a Jones Act seaman. He alleged that he was soaked because of a defect in the barge equipment. At time of lawsuit, P had no signs of cancer yet. P sued for pain & suffering (P & S) as well as for medical expenses related to his regular check-ups required as a result of being soaked. Key issue in case is whether P’s cause of action in tort had “accrued.” 5th Cir. notes traditional “**single cause of action rule**,” whereby cause of action accrues (permitting P to sue for present damages, future damages, and “probable” future damages) and S-O-L begins to run when P discovers D’s “wrong.” Dist. Ct. dismissed, holding that P’s cause of action had not yet accrued since he has not yet manifested any sign of cancer. 5th Cir. reverses.

5th Circuit holds that P did suffer a “physical injury” sufficient for his cause of action to accrue. He felt numbness, tingling, and – at the time of the soaking – and, thus, suffered some P & S; he also suffered MENTAL ANGUISH based on his knowledge of the cancer-causing nature of the chemical. Ct. holds that P entitled to recover damages for P & S as well as for mental anguish for “cancerphobia” even though no cancer manifested yet. **In dicta** (since P did suffer a physical injury), 5th Cir. *rejects* traditional rule that, in order to recover damages for mental anguish based on cancerphobia, a plaintiff must meet the “physical injury” requirement. Ct. also holds that P entitled to recover for the continuing expenses related to his periodic medical check-ups.

Ct. rejects P’s claim for damages for “increased risk” of cancer. P did not offer proof that it was “more likely than not” (i.e., >50%) that he would develop cancer as a result of the chemical spill. However, in dicta, the three-judge panel encourages en banc 5th Circuit (or Congress) to overrule the “single cause of action” rule in a case such as this one (where P is unable to show >50% odds within limitations period but where cancer may develop outside of limitations period).

POST-SCRIPT: On rehearing in this case and later in another case (Gaston v. Flowers Transp., 866 F.2d 816, 819 (5th Cir. 1989)), the 5th Circuit held that at least some type of physical impact required in order for mental anguish damages to be recovered. Mere “bystanders” to toxic chemicals who have not yet manifested cancer or other such illness can’t recover mental anguish damages. Most courts either follow this rule or require an actual “injury” in order for plaintiff to recover mental anguish damages for “cancerphobia.”

“Hedonic” Damages:

McDougald v. Garber (NY 1989): Medical malpractice action -- P, patient of Ds, OB-GYN & anesthesiologist. P in permanent coma (severe brain damage) as a result of Ds’ medical malpractice. Jury awarded P \$9.6 million -- both “pecuniary” and “nonpecuniary” damages: “Pecuniary”

damages for lost future earnings as well as costs of nursing home and medical care. “Nonpecuniary” damages for P & S, and loss-of-enjoyment-of-life (“hedonic”) damages. (P’s husband also awarded damages for loss of wife’s “services.”)

Key issue on appeal is trial court’s award of significant money (\$2 million) for P’s P & S and loss of enjoyment of life. Ds challenge that because P is unconscious in a coma. Disputed evidence regarding whether, because of her comatose condition, P is able to feel any pain and is cognitively aware of condition. Trial court instructed jury (and parties not in dispute) that, in order to recover damages for P & S, P must have some consciousness. Trial court further instructed jury, however, that in order to recover for loss of enjoyment of life, P need not have any consciousness. Over Ds’ objection, trial court bifurcated P & S damages and loss-of-enjoyment-of-life damages. Court of Appeals reverses and orders a new trial on nonpecuniary damages. Court holds that: (a) in order to recover for P & S, “some” level of consciousness required and (b) loss of enjoyment of life is simply an element of P & S, not a distinct type of compensable harm. Ct. reasons that to hold otherwise would be to ignore “compensatory” nature of tort law and focus more on “punishment” aspect better left to the criminal law.

* “Translating human suffering into dollars and cents involves no mathematical formula; it rests . . . on a legal fiction.”

* Ct. recognizes paradox here: the more severe the harm caused by the medical malpractice (in terms of the degree of brain injury), the smaller the amount of damages

VIGOROUS DISSENT: disagrees with majority regarding whether consciousness is required for damages for loss of enjoyment of life; also disagrees that loss-of-enjoyment is a subset of P & S

Fantozzi v. Sanducky Cement Products Co. (Ohio 1992) (Note, Casebook, at pp. 866-69): takes the opposite approach from the NY Court of Appeals – permits separate recovery of damages for loss of enjoyment of life. Reasons that it is not encompassed within P & S because that concerns the “infliction of a negative experience” rather than “a loss of a positive experience.” Duplicative damages awarded may be awarded by LIMITING INSTRUCTIONS TO THE JURY.

* “Objective” vs. “Subjective” view of Hedonic Damages

* Jurisdictions all over the map on this issue – Texas follows traditional rule that hedonic damages are not a separate element of damages (part of P & S or “general” damages) – see Mo. Pac. RR. Co. v. Lane, 720 S.W.2d 830 (Tex.App. 1986).

* ASK CLASS TO VOTE ON THIS ISSUE

Inflation/Present Value issues regarding Lost Future Income Damages (PI & Wrongful Death cases):

O’Shea v. Riverway Towing Co. (7th Cir. 1982) (Posner, J.): federal admiralty tort (negligence) case – P, a cook on a towboat, fell and was injured as a result of towing co.’s negligence. She sued and awarded, *inter alia*, lost future wages. First issue on appeal is whether dist. ct. erred by failing to

“discount” P’s damages award by probability that she could get another job (cf. mitigation-of-damages concept). D presented this issue in an all-of-nothing sense (i.e., whether it was more likely than not that she could get another job – other than a cook on a ship). Posner points out that the “better procedure” would be to subtract the potential wages in another job, discounted by the probability (“very low”) that P would be able to work at another job. But D did not ask for this procedure in trial court, so 7th Cir. affirms dist. ct.’s finding that it was more likely than not that P would ever work in another job (and, thus, not reducing her lost income damages). Second issue on appeal is whether trial court’s damages award for lost wages was erroneous because this was P’s first full-time job and she had been at it less than one year? Ct: No error. Lack of past wages not a bar to award of future wages if P employed at time of tort. It is one factor a court considers in determining the likelihood of P’s hypothetical future employment (in terms of calculating lost future wages), but not a *per se* bar.

Key issue on appeal is how to account for future inflation in determining damages for loss future wages. D objected to trial court’s factoring prediction of future inflation (based on past inflation) into amount of P’s damages for lost future income. Based on testimony of P’s economist expert witness, trial court increased amount of P’s damages by assuming that \$ is worth less today than the same amount would be worth in future. That is, trial court determined that P’s hypothetical future wages would increase over time based on both merit raises *and* cost of living (C-O-L-A) raises. D objected to this, yet did not object to same expert witness’ factoring future inflation into the “present value” discounting of damages award. 7th Circuit held that trial court was correct in factoring inflation into *both* wage increase issue (which P wanted) *and* present-value discount (which D wanted). MUST CONSIDER INFLATION AT BOTH SIDES OF EQUATION (or take it out from both sides of equation). Ct. also notes another potential discount factor – probability that P employee would not work the estimated number of years in formula. Ct. notes a number of errors in economic analysis supporting lost wages damages award, but affirms award as “reasonable” overall notwithstanding errors. Ct. criticizes trial court for failing to articulate his findings on calculation of lost wages damages – which is “mathematical”/“analytical” and not “intuitive” (*cf.* P & S) – yet does not reverse since damages were “reasonable” at the end of the day.

*** SEE MY HYPO HAND-OUT – THIS IS EXTREMELY COMPLEX FROM AN ECONOMICS POINT OF VIEW (get an expert witness)

- * “real” rate of return on investment & “real” wage inflation (vs. “price inflation)

- * 2 other potential “discounts” – (a) likelihood other employment if not permanently disabled and amount of wages earned each year; (b) likelihood of P’s working until retirement age

- * although compensatory damages award not subject to income taxation, the interest earned on a “safe investment” is (and must be factored in) unless “safe investment” is municipal bonds

- * Jurisdictions vary dramatically in terms how these many factors are to be considered

- * PRESENT VALUE DISCOUNT OF DAMAGES – original rationale was a variant of mitigation-of-damages requirement (i.e., amount of lump-sum damages mitigated by P’s safely

investing them)

Rieth-Riley Constr. Co. v. McCarrell (Ind. 1975) (Note, Casebook, at pp. 875-76): Ct. held that damages award for P's "lost time" is appropriate even if P was unemployed at time of disabling accident (yet he had worked in part and offered proof that he could have worked in future but for injury sustained as a result of D's negligence). "Lost time" here means something apart from decreased earning capacity (even housewives may recover this type of damages). Yet court notes that P still must prove value of such lost time or damages will be disallowed or restricted.

Jones & Laughlin Steel Corp. v. Pfeifer (US Sp. Ct. 1983): Longshoremen's & Harbor Workers' Compensation Act case – P, a "loading helper" on a coal barge, was permanently disabled as a result of D barge-owner's negligence. Dist. Ct. applied Pennsylvania Sp Ct.'s simplistic damages approach whereby ct. did not consider inflation at either stage of analysis and did not engage in any type of "present value" discounting – held that future interest rates and future inflation entirely offset each other. US Sp. Ct. disagreed.

In discussing damages issue, Ct. first held that "ideally" not only lost "stream" of income/wages should be considered but also the lost fringe benefits, retirement benefits, etc., should be considered ("but are frequently excluded for simplicity's sake"). Ct. also notes that, because compensatory damages awarded are not taxed, "ideally" the "stream of income" should be AFTER-TAX income. Thirdly, ct. notes that "ideally" a worker's UNREIMBURSED costs should be deducted from income stream (e.g., commuting expenses, etc.).

Ct. then turns to PRESENT-VALUE DISCOUNT of lost "net" stream of future income. Formula should be based on rate of return of "best and safest investments" (as risk-free as reasonable possible). Since lost stream of income is supposed to be based on AFTER-TAX income, rate of return used in present-value discount should also be an AFTER-TAX RETURN.

Ct. also requires the trier-of-fact to discount "each of the estimated installments in the lost stream of income, and then add up the discounted installments to determine the total award."

Ct. holds that inflation must be factored-in at both steps in damages calculus because inflation significantly affects the long-term interest rate used to do the "present-value" discount rate

Ct. refuses to announce a general approach to be applied in all federal cases – this case's holding narrowly applies to Longshoremen's & Harbor Workers' Act cases, and even gives trial courts (and parties) the choice of factoring in inflation (but if it is to be done, it must be done at both steps in damages formula) – Ct. vacates and remands for dist. ct. to reconsider lost earnings calculus

* Ct. notes the many different approaches by lower courts in terms of dealing with inflation – spectrum from pure "offset" approach <-----> fine-tuning approach by U.S. Sp. Ct. in Pfeifer

* "real wage inflation" (that is, apart from "price inflation") – both real wage inflation, price inflation, and "real" rate of return on investments have been rising since WWII

* NOTE: difference between judge determining damages (where ct. should be required to make detailed findings and an expert witness is important) and a jury determining damages (where jury instructions and expert witnesses are key).

* NOTE: Plaintiff has burden of proof on damages issues (i.e., must offer actual proof of these things); Defendant should offer contrary evidence, where appropriate – DON'T JUST ASSUME TRIAL COURT WILL FIND THESE THINGS BASED ON "ASSUMPTIONS"

Monessen Southwestern Railway Co. v. Morgan (US Sp. Ct. 1988) (Note, Casebook, at p. 885): in a case where a jury determines damages for lost earnings, the issue of the particular approach to take if for the jury (trial judge should not instruct jury as a matter of law on the approach to take)

* if it is the jury determining damages, USE A GOOD EXPERT WITNESS!

"Collateral Source" Rule:

* Traditionally, most jurisdictions in U.S. have applied the collateral source rule (Texas included)

* Criticism of C.S.R. as punitive in nature – goal of tort recovery in negligence cases is compensatory, not punitive

Helfend v. Southern Calif. Rapid Transit District (Calif. 1970): P injured as a result of negligence of D (city bus & driver). D found liable. 80% of P's medical bills would be paid for by private insurance co. Trial court applied traditional "collateral source" rule, whereby insurance or other third-party payments to P does not reduce P's damages. Issue here is whether collateral source doctrine applies when the defendant in a tort case is a governmental entity. Ct. holds that C.S.R. applies to this claim, notwithstanding fact that D is a gov't entity. Application of the C.S.R. not "punitive" here. Legislature can change this result it wishes.

* Traditional collateral source rule only applied to sources "entirely independent" of tortfeasor (thus, it wouldn't apply to payments from a tortfeasor's insurance co. or from a co-D)

* Many courts apply C.S.R. when P paid insurance proceeds because insurance policies (life or accident policies, or even medical insurance) are somewhat tantamount of "investments" (P paid premiums based on risk assessment).

Tax consequences of lost profits damages:

* compensatory damages are not taxed in a personal injury cases – compensatory damages in non-personal injury cases are taxed – *all* punitive damage awards are taxed

* Majority approach (traditional approach) in U.S. jurisdictions is that juries are *not* told that lost income damages are not taxed – rationale is that future taxes too speculative [contrast traditional

rule regarding future inflation]

Norfolk & Western Railway v. Liepelt (US Sp. Ct. 1980): Federal Employers' Liability Act (F.E.L.A.) case [popular name of this statute a misnomer – not “federal employer” – rather interstate common carrier, typically railroad carrier] – Wrongful death action by railroad fireman's estate – Issue: Should jury be instructed on (or even told about) whether lost income damages are subject to income taxes (to which such damages are *not* subject)? Employer (D) wanted evidence introduced about what taxes would have been paid on P's future lost wages and have jury instructed on fact that such damages not subject to taxation. Sp. Ct. held that such evidence should be admitted and jury should be so instructed. Ct. reasons that, if juries must be told about decedent P's “personal expenditures” that would reduce “net” income to decedent's family, then jury should likewise be told about fact that damages will not be subject to income taxes. However, to be fair, Ct. holds, jury must also be told about fact that there *will be* income tax on future earnings on present-value discounted damages award – SYMMETRY.

DISSENT: Majority guts Congress' rationale for exempting income tax on such damages (i.e., a humanitarian subsidy to victim and/or his survivors) and transfers such a benefit to the tortfeasor

* in Liepelt, decedent's survivors' damages award also included damages for value of “care and training that decedent would have provided for his young children”

* Note: US Sp Ct cases such as Pfeifer and Liepelt are binding only in federal cases in same posture (i.e., Jones Act or FELA cases) and do not bind lower federal courts in other contexts or bind the state courts (yet pervasive authority) – Liepelt represents “minority” approach

* **Remittitur & Additur** – US Sp Ct's decisions in Dimick & Hetzel (Casebook, at p. 897, Note 1): When a reviewing court determines that a new trial is appropriate on a damages award, the plaintiff can avoid a new trial by agreeing to a remittitur and, at least in some jurisdictions, a defendant can avoid a new trial by agreeing to an additur. US Sp Ct has held that additur is never permitted in federal cases (as it would violate the Seventh Amendment right to a jury trial). See Dimick. However, some lower courts and legal commentators have suggested that a subsequent case, Hull, casts doubt on Dimick's continuing validity. Sp. Ct. likely to address this issue one day.) Ct. has held that remittitur is permitted if plaintiff consents as a way of awarding a new trial (“conditional remittitur”). See Hetzel.

*** Texas law appears *not* to permit additur; does appear to permit conditional remittitur

* statutory caps on damages & judicial decisions striking down (Note 2): many statutes have passed such statutory “caps” on damages and some state supreme courts have struck down the provisions under state constitutions – Texas Legislature has passed some damages cap statutes (particularly with respect to punitive damages and Tx Sp Ct upheld at least one statutory damages cap).

Nominal Damages:

Carey v. Piphus (US Sp. Ct. 1978): case of the pot-smoking freshmen & earring-wearing 6th grader

– § 1983 civil rights action by students who were suspended without procedural due process – trial court found there was no “actual injury” to suspended students; rather, they were simply denied procedural (not substantive) due process. Trial court awarded nominal damages only. 7th Circuit reversed, holding that “substantial” compensatory damages appropriate in order to vindicate procedural due process violation. US Sp. Ct. reversed 7th Circuit, holding that, without proof of actual injury, students only entitled to nominal damages. No “presumed” or “inherent” damages simply because there was a constitutional rights violation. Sec. 1983 is a “constitutional tort”; purpose of tort law is compensation (not punishment). Can’t presume damages here. (Contrast defamation *per se*, where such a tort does typically cause damage to plaintiff, and such damages are difficult to prove.)

* Of course, students attorneys, as the “prevailing party,” are entitled to substantial attorneys fees under 42 U.S.C. § 1988, even if only nominal damages

* in a footnote, Ct. recognizes possibility of punitive damages in sec. 1983 case such as this one where plaintiff proved “malicious intent” on part of school officials (but no such proof in this case)

Memphis Community School Dist. v. Stachura (US Sp. Ct. 1986): Issue is whether compensatory damages are allowed based on a fact-finder’s assessment of the abstract “value” or “importance” of a *substantive* constitutional right. Plaintiff was a sex-ed public school teacher who was wrongfully temporarily suspended (with pay) based on unsubstantiated and false rumors about his alleged controversial teaching methods. At trial, in addition to instructing jury on traditional compensatory (e.g., economic loss, mental anguish, and loss of reputation) & punitive damages, trial court also instructed jury on damages based on abstract “value” or “importance” of constitutional rights being violated. US Sp Ct reverses. Court focuses on COMPENSATORY nature of “constitutional tort” remedy. Relying on Carey, majority holds that such a basis of recovery is improper, even though this case involved “substantive” violation and Carey involved “procedural” violation. Only recovery for “actual,” palpable damages. No “presumed” damages here. Only nominal damages for such a right violation, if plaintiff cannot prove actual damages.

LIBERAL CONCURRENCE (5-4): Disagrees with majority’s broad holding – suggests that “in a proper case” a mere violation of a constitutional rights should be compensable with more than nominal damages – some constitutional rights violations can’t be quantified in terms of economic loss, mental anguish, etc.

* In a footnote, even majority of Ct. recognized exception for violation of a person’s right to vote, where damages are presumed.

CLASS NOTES #19

Loss of consortium:

* “The remedy for the negligent *or* intentional impairment of . . . [t]he marital relationship . . . is a tort action for loss of consortium.”

* “The phrase ‘loss of consortium’ is more accurately described as an element of damage rather than a cause of action.”

* “Consortium . . . can be generally defined to include the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to [for] a successful marriage.”

* Pecuniary (lost future income, etc.) vs. Non-pecuniary damages (mental anguish, loss of consortium)

* Under Texas community property⁷ law, loss of consortium does not include “services” rendered by a spouse to the marriage – meaning “the performance by a spouse of household and domestic duties.” The latter is an entirely distinct concept from “consortium.” The “services” belong to the “community” and “are thus recoverable as damage to the community.”

* Loss of consortium is a “derivative” claim for damages – meaning that any defenses that a D has against the injured spouse (e.g., contributory negligence) also apply against action brought by non-injured spouse

* In most jurisdictions, loss of consortium damages based on injured spouse *or* killed spouse (in most jurisdictions, loss-of-consortium damages for dead spouse fall under damages recoverable under Wrongful Death Statute)

* General rule is that parties must be married at time of injury, see Rockstroh v. A.H. Robins, 602 F. Supp. 1259, 1269 (D. Md. 1985), although some courts allow for damages based on latent defect prior to marriage that manifested itself only after marriage

* cf. old common-law actions for alienation of affection/criminal conversation

Whittlesey v. Miller (Tex. 1978): Issue: does one spouse have an independent cause of action (and right to collect damages from) a person who physically injures the other spouse? The injured spouse, husband, settled with the D after an auto accident in which the D was negligent. A release was signed as part of the settlement. P wife then sued D for damages caused by loss of consortium. Tx Sp. Ct. holds that such a separate action may be maintained by non-injured spouse even if injured spouse previously settled with D.

Reagan v. Vaughn (Tex. 1990): Is there such a thing as loss of “parental consortium” when a parent

is injured but not killed? P's father got into a bar fight with D in Pasadena, TX. Manager of bar struck P's dad with a baseball bat, causing permanent brain injury. P (child) sued for loss of parental consortium *in addition to* mental anguish damages. "The obvious and unquestionable significance of the parent-child relationship compels our recognition of a cause of action for loss of parental consortium." "We hold that children may recover for loss of consortium when a third party causes serious, permanent, and disabling injuries to their parent." Ct. limits "loss of consortium" action to parent/child and spouses – not grandparents, etc. Ct. extends parental consortium action to ADULT children – not limited to minor children. Ct. holds that child may recover NON-PECUNIARY DAMAGES for loss of parental consortium (as well as loss of "services"). Various factors for factfinder to consider in assessing amount of damages. Ct. denies P her "mental anguish" damages since she was not present at scene when her father was injured.

DISSENT (Hecht, J.): Vigorous, lengthy dissent – focuses on facts of case – dissent would limit damages to cases in which parent is killed as opposed to permanently injured – criticizes majority's judicial activism – "On the whole, the Court's ruling does little more than increase the stakes in high-dollar personal injury litigation." Criticism of PI ("Plaintiffs") lawyers.

* QUESTION: IS DISSENT IS CORRECT?

* Tx follows small minority rule here

* Doubtful that current TX Sp. Ct. would go the same way, but not overruled yet

* *Note*: Cause of action/damages for negligent infliction of mental anguish has been abolished by Tx Sp Ct., save in case of bystander or when separate duty of care owed to P by D [Boyle v. Kerr, 855 S.W.2d 593 (Tex. 1993)]

* Texas recognizes loss of consortium actions for parent/child; child/parent; and spouse/spouse

Wrongful Death:

* now a statutory cause of action in most jurisdictions (including Texas, see Tex. Civ. Prac. & Rem. Code § 71.004) – based on "Lord Campbell's Act" (English, 1846)

* some statutes permit decedent's *estate* – rather than specified class of survivors – to recover damages

Liff v. Schildkrout (NY 1980) -- Issue #1: is there a common-law action for loss of consortium that survives the state legislature's enactment of a statutory action for wrongful death? No, NY Court of Appeals holds. C/l action did not survive statute. "[L]egislative enactments have preempted this area." Issue #2: is loss of consortium at least an element of damages under statutory wrongful death claim brought by surviving spouse? No, court further holds. Plain language of wrongful death statute covers only "pecuniary" damages (lost future income, medical & funeral expenses) – *not* non-pecuniary damages for loss of consortium.

* California Sp. Ct. went the opposite direction in Krouse v. Graham (Cal. 1977) (Note, Casebook, at p. 933), which permitted non-pecuniary damages in wrongful death action; however, California statute's language not expressly limited to "pecuniary" damages

* Majority of jurisdictions (including Texas, and US Sp Ct in maritime case) have permitted both pecuniary *and* non-pecuniary damages to be recovered in wrongful death cases

Yowell v. Piper Aircraft Corp. (Tex. 1986): issue is whether decedent's survivors may recover damages for "**loss of prospective increase in inheritance**" in a wrongful death case. Ps are survivors of decedent who was killed in plane crash as a result of aircraft corp.'s negligence. Tx Sp. Ct. permits recovery of "loss of inheritance" damages by those persons otherwise entitled to recover damages under wrongful death statute. Different damages from lost future earnings. To prevail on such a claim, a plaintiff must prove two things: (1) probability that decedent would have accumulated an estate of a certain size; (2) probability that decedent would have left certain percentage to plaintiff. Measure of damages – present value of plaintiff's likely share of decedent's potential estate had decedent died at a normal age.

* QUESTION: Why is this not a double recovery of a plaintiff who also may sue for lost future income under Wrongful Death Act? See Dissenting opinion in McGee

* Many jurisdictions allow for loss-of-inheritance damages

Mitchell v. Buchheit (Mo. 1977) -- Issue: whether parents of deceased child may recover damages for pecuniary benefits which they would have received from child after child became an adult – Mo. Sp. Ct. says yes. Nearly 20-year old son of Ps killed in car accident. Parents sued under wrongful death statute. Ct. held that parents could recover value of child's services (minus expenses of raising child) as a minor and "pecuniary benefits" that parents would have received after child reached majority.

Sanchez v. Schindler (Tex. 1983) – Issue: whether parents may recover for MENTAL ANGUISH damages in wrongful death action based on death of minor child, or does Wrongful Death Act limit recovery to "pecuniary" damages? Ps' minor son killed in car/motorcycle crash. Ct. holds that Texas W.D.A. does not limit recovery to "pecuniary loss" (contrast NY, see Liff, supra). Ct. notes English cases interpreting Lord Campbell's Act limited damages to pecuniary loss and most U.S. jurisdictions have done the same (including a 1877 Texas Supreme Court case). Under modern Texas law, Ct. holds, now both pecuniary and non-pecuniary damages (e.g., loss of consortium) may be recovered in wrongful death case. Ct. specifically permits recovery for MENTAL ANGUISH.

* QUESTION: May mental anguish damages be recovered if D only negligently inflicted damages? Not under Reagan and Boyle unless P was a "bystander" (Sanchez was a 1983 case.)

Death of Fetus:

Farley v. Sartin Trucking Co. (W.Va. 1995): Ct. extends wrong death action to a non-viable fetus.

Pregnant wife of P killed in car accident; D negligent. P sued under wrongful death statute for both death of wife and death of unborn child. Ct. permits that action based on death of unborn child “regardless of viability.” Ct. specifically holds that a non-viable fetus is a “person” within meaning of W.D. statute. Ct. careful to distinguish abortion issue.

Amadio v. Levin (Pa. 1985) (Note, Casebook, at p. 945): follows same approach, but permits recovery by dead fetus’ estate rather than by surviving parent(s)

Wrongful Conception/Pregnancy/Birth & Wrongful Life:

* Wrongful conception/pregnancy/birth (brought by parents; healthy or deformed baby) vs. Wrongful life (brought by kid’s guardian; typically a deformed baby) → wrongful conception specifically refers to botched sterilization; wrongful pregnancy/birth refer to a doctor who negligently fails to detect birth defect

* Clear majority of jurisdictions recognize these types of claims – including Texas – *yet major division on type/extent of damages that are recoverable*

* These cases are highly emotional (raising heavy moral issues, e.g., abortion) – also serious philosophical debate over whether human life may be monetarily valued and whether child’s birth can ever be deemed an “injury” to parents

Hartke v. McKelway (D.C. App. 1983): P, woman who was unsuccessfully sterilized by D doctor. “Wrongful birth” claim by woman for, *inter alia*, ordinary child-rearing expenses. Trial court disallowed damages for child-rearing expenses after finding that P got sterilized for non-economic reasons (therapeutic or eugenic reasons) and also because the P loved (“prized”) the child. Appellate court affirms, holding that if evidence shows that parents’ motive for sterilization was NON-ECONOMIC, then there is a “rebuttable presumption” that birth of healthy child did not “damage” parents.

* Damages for mental anguish & physical pain associated with pregnancy child-birth – *not* in Texas (Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975)).

* Many jurisdictions that do permit child-rearing damages permit an **OFF-SET** for benefits of having child

* US jurisdictions split on whether child-rearing expenses may be recovered for “wrongful birth” claim – in Texas, they may *not* be recovered, at least if healthy child; only medically-related expenses recoverable if healthy child born; special child-rearing expenses recoverable if defective child – see Crawford v. Kirk, 929 S.W.2d 633 (Tex.App. 1996).

* Courts more likely to award child-rearing expenses where they are “extraordinary” based on physically or mentally defective child

* Potential mitigation-of-damages issue – abortion or adoption by P?

Reed v. Campagnolo (Md. 1993): medical malpractice/wrongful birth case – P had a malformed baby; D was negligent in failing to inform P of available diagnostic test that, if it would have revealed defect and led to voluntary abortion by P. Ct. recognizes cause of action, and permits the following types of damages to be recovered: (1) P & S; (2) mental anguish; (3) “extraordinary” child-rearing expenses with offset for any benefit from child (likely little if any here since birth defect).

CLASS NOTES #20

PUNITIVE DAMAGES (“punies”):

- * origins in 1700s in England
- * also known as “exemplary” damages
- * primary purpose is punishment (deterrence/retribution, not compensatory) – historically, such damages payable to plaintiff, not society as a whole (compare punitive fines in civil or criminal cases) – “QUASI-CRIMINAL”
- * a secondary purpose of punies is to encourage private lawsuits (cf. statutory allowance for attorneys fees awards to prevailing party) – “private attorney general” policy
- * traditional “discretionary” punitive damages vs. modern statutory “built-in” punitive damages (statutory trebling of damages in many cases)
- * Ideological schism between more liberal jurists/legal scholars vs. more conservative jurists/scholars over punies – yet ideological role-reversal when federal court reviewing state court’s punitive damages award (federalism)
- * A defendant’s financial condition (ability-to-pay or lack thereof) is typically relevant evidence during “damages” phase of trial – see, e.g. Owens-Corning Fiberglass Corp v. Malone, 972 S.W.2d 35, 40 (Tex. 1998)
- * In most jurisdictions, a defendant may offer “mitigating evidence” to counter plaintiff’s claim for punitive damages – see Owens-Corning, supra (evidence in “mass tort” case that the defendant had previously paid punies in an earlier litigation involving different plaintiffs)
- * Much more likely to win punitive damages in state court than in federal court (Judge Atlas)

Punies in Tort Cases:

- * Traditional standard for punies in tort cases in majority of jurisdictions – Restatement (2d) of Torts, § 980(2): “Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive *or* his reckless indifference to the rights of others.”
- * various synonyms for recklessness *mens rea* – “wanton or willful disregard,” “conscious disregard,” “reckless indifference” – some jurisdictions (erroneously) also refer to this as “gross negligence” [objective vs. subjective standards]
- * Prior to 1995, Texas allowed punies if “gross negligence”
- * Some jurisdictions require specific intent to harm (“actual malice”)

* At least one jurisdiction (AL) applies a mere negligence standard, at least in wrongful death cases

* Louisiana does not allow punies unless expressly provided by statute

Smith v. Wade (US Sp. Ct. 1983) (Brennan, J.) – issue: what is the correct legal standard for punitive damages in § 1983 civil rights case? P, prisoner, alleged that Ds, jailers, knowingly or recklessly placed him in a cell with violent inmates, knowing that such inmates had a violent history toward other inmates. P was physically and sexually abused by those inmates. He subsequently filed a § 1983 action, alleging cruel and unusual punishment. Dist. ct. charged jury that punies could be awarded if jury found knowledge or “callous or reckless disregard or indifference” to rights of P. ***Mens rea***. Yet the same *mens rea* is required to win on an 8th Amendment claim of cruel and unusual punishment/prison conditions claim. Jury awarded actual and punitive damages.

U.S. Sp. Ct. holds that § 1983 claims are a “species of tort liability” (known as “constitutional torts”) and that common law principles generally apply. Traditionally, in tort cases, callous or reckless indifference/disregard is the only *mens rea* required for imposition of punitive damages. Guards contend that something more should be required for punies in a § 1983 case – “actual malice” (i.e., specific intent). Sp. Ct. rejects this argument. Reckless indifference is a sufficiently “evil” *mens rea*. Majority claims that because legislative history to § 1983 largely silent on this issue, must assume that Congress intended to follow common law, which in mid-1800s permitted punies for reckless indifference.

MAIN DISSENT (Rehnquist *et al.*): Vigorous criticism of punitive damages generally by conservative members of the Court – “[T]he doctrine of punitive damages has been vigorously criticized throughout the Nation’s history.” Punies are “quasi-criminal,” yet little if any of the procedural safeguards in criminal cases (e.g., proof beyond a reasonable doubt). Many critics say that punies, if awarded, should be paid to the government. Punies frequently based on caprice and prejudice of jurors – not subject to mathematical determination (or even any relation to the actual harm suffered by the plaintiff) the way that compensatory damages are. If goal of punies is to deter, then illogical to apply punies to defendant’s conduct that is less than intentional. In specific context of law enforcement/prison guards, “policy” consideration – don’t deter or “chill” gov’t actors from carrying out their jobs (*cf.* qualified immunity doctrine). Punies especially inappropriate in § 1983 cases because prevailing plaintiffs also are awarded attorneys fees. Dissent claims that prevailing common-law in mid-1800s – which Congress presumably followed – does not support punies. Also, FEDERALISM concerns militate against punies here.

Justice O’Connor’s Separate Dissent (moderate approach): Legislative history/state of common law in mid-1800s doesn’t shed meaningful light here. O’Connor opposes punies in § 1983 cases because attorneys fees available. Compensatory damages and attorney fees are sufficient deterrence. O’Connor disagrees with conservative Justices’ “wholesale condemnation of punitive damages.”

QUESTION: Who agrees with Renhquist’s “wholesale condemnation”?

* Discuss importance of PROPER JURY INSTRUCTIONS as a general matter

Ngo v. Reno Hilton Resort Corp. (9th Cir. 1998) (Note, Casebook, at p. 966): a more “egregious” *mens rea* required in Title VII/section 1981a cases for punitives than for compensatory damages – most courts will apply a “heightened standard” to punitives in reviewing jury’s punitive award (i.e., court may uphold compensatory damages but strike punitive damages award) – example of a lower court limiting Wade

*** Primary federal civil rights statutes and their remedies***

42 U.S.C. § 1983 (permits for civil rights lawsuit where there is “**state action**” that deprives persons of “any rights, privileges, or immunities secured by the Constitution and laws” of the U.S.)

* compensatory and punitive damages permitted, as well as equitable relief (typically injunctive relief); no statutory caps on damages

* attorneys fees available under 42 U.S.C. § 1988

42 U.S.C. §§ 1981 & 1982 (applicable to “**nongovernmental discrimination**” as well as some governmental discrimination; “all persons” shall have same right in every state “to make and enforce contracts” and protection of laws regarding selling/leasing of property “*as is enjoyed by white citizens*”; covers “the making, performance, modification, and termination of contracts, and the enjoyment, of all benefits, privileges, terms, and conditions of the contractual relationship”)

* applicable only to discrimination based on *race/alienage*

* primarily applicable to contract-related and property-related discrimination, although broad interpretation of statute here (e.g., employment contracts – hiring, firing, promotion; discrimination by labor unions; general/sub contractual dealings; real estate contracts, leases – housing discrimination; public & private school discrimination)

* compensatory and punitive damages generally allowed (including backpay), as well as equitable relief

* attorneys fees available under 42 U.S.C. § 1988

* 11th Amendment immunity for legal lawsuits against states (yet injunctions); legal and equitable lawsuits against cities

42 U.S.C. § 2000a et seq. (“**Title VII**”; Civil Rights Act of 1964) (prohibits “unlawful employment practices” by private parties based on “**race, color, religion, sex, or national origin**”)

* generally applies to private employers with 15 or more employees

* prior to 1991 Civil Rights Act, no mandatory legal remedies (compensatory/punitive damages) – rather, primarily an equitable remedy (injunctive relief, including mandatory injunction in form of reinstatement order) with “discretion” for monetary remedy in form of backpay – 1991 Act provided for mandatory compensatory damages, where proved and punitive damages where appropriate (see infra)

* EEOC typically involved here (initial step is filing complaint with EEOC and getting a “right to sue” letter

* not applicable to age discrimination

42 U.S.C. § 1981a (1991 Civil Rights Act) (“Damages in cases of intentional discrimination in employment”) – separate statute from section 1981; linked instead to Title VII

Section 1981a(b)(1) – punitive damages recoverable if the defendant “engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual”

Section 1981a(b)(2) – compensatory damages don’t include backpay

Section 1981a(b)(3) – statutory caps on compensatory and punitive damages for “future pecuniary losses, emotional pain, suffering, and inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses” – caps range from \$50K to \$300K, depending on the size of the discriminating employer —> yet if jury trial, jury not informed of damages caps

* 42 U.S.C. § 1988 permits attorneys fees for § 1981a cases

42 U.S.C. § 2000d (“Title VI”) – no person shall be excluded from, or denied benefits of, or subjected to discrimination in, “any program or activity receiving Federal financial assistance”

* Equitable relief only; no legal (money) damages

42 U.S.C. §§ 12112 et seq. (American with Disabilities Act of 1990 or “**ADA**”)

* same remedies available as in Title VII/§ 1981a

29 U.S.C. § 621 et seq. (Age Discrimination in Employment Act or “**ADEA**”)

* equitable and legal remedies available

* “liquidated damages” (double back-pay); “front-pay” in lieu of reinstatement

*** *Note:* Many states have similar statutes/causes of action applying to private discrimination

Taylor v. Superior Court (Calif. 1979) – issue: may punies be recovered in a case of a personal injury caused by a drunk driver? Ct. holds yes. Although recognizing that “something more than the mere commission of a tort is always required for punitive damages” – that is, some sort of “animus malus” (“evil intent” or “evil motive”) – reckless indifference or conscious disregard by defendant is enough. In this case, there is PATTERN of drunk driving, which is evidence permits inference that the D acted with conscious disregard, punies appropriate. Ct. holds that such a pattern is not always required for recovery of punies in a P.I./drunk-driving case. Any drunk driver acts recklessly.

DISSENT: leave punitive measures for the criminal law – general criticism of punitive damages, including noting the arbitrariness of punies being based on the financial status of the defendant

* Taylor is the majority position – Texas, too – see Crider v. Appelt, 696 S.W.2d 55 (Tex.Civ.App. 1985)

* Dissent notes that traditional rule is that defendant’s insurance company need not (in some jurisdictions, may not) pay punitives – Texas law presentation

Nardelli v. Stamberg (NY 1978) – issue: are punies available in a malicious prosecution case? Yes, ct. holds. “Actual malice” element of liability for malicious prosecution is *ipso facto* sufficient to support jury’s award of punitive damages – another example of OVERLAP between establishing threshold tort liability and punies

Nappe v. Anschelewitz, Barr, Ansell & Bonello (NJ 1984) – issue: are punitive damages appropriate when the jury or judge only awards nominal compensatory damages? Yes, ct. holds. Civil action for fraud, i.e., *an intentional tort*. Only \$2 compensatory damages award (nominal damages), yet \$50K in punies. Ct. upholds punies because actual damages are not an essential element of an intentional tort. Furthermore, “[t]he punitive damages award is not required to have a fixed proportional relationship to the amount of compensatory damages.” Rather, the purposes of punies are GENERAL AND SPECIFIC DETERRENCE, as well as PUNISHMENT (moral retribution). However, ct. recognizes that the plaintiff must show “**some injury, loss, or detriment**,” even if plaintiff cannot recover anything except nominal damages.

* general vs. specific deterrence

Oliver v. Raymark Industries, Inc. (3d Cir. 1986) (Note, Casebook, at p. 974-75): ct. holds that, in a tort case sounding in negligence or strict liability, there must be SOME actual damages (more than nominal damages) in order for there to be punitive damages. Only in cases of intentional torts may nominal damages suffice to support an award for punies. Without actual damages, there is no cause of action for negligence or strict liability.

Jackson v. Johns-Manville Sales Corp. (5th Cir. 1986) (en banc) (**Randall, J.**): “Mass tort case” -- asbestos litigation – diversity case -- P sued asbestos manufacturers. Jury awarded \$391K in compensatory and \$625K in punies. D manufacturers contended that punies are not appropriate in a mass tort case. 5th Circuit rejects Ds’ argument. Mississippi law permits punies for “exceptional” or “extreme” cases. Policies of Mississippi law – “deterrence” and “private attorney general”

(encouraging private enforcement of laws that bring wrongdoers to account). Overwhelming majority of jurisdictions permit punies in mass tort cases involving “egregious” conduct. D countered that, if punies permitted in mass tort cases, then multiplicity of litigation could bankrupt manufacturers and hurt society as a whole (law & economics approach). 5th Circuit rejects as a perverse the defendants’ argument that the more victims harmed, the less damages that a defendant would have to pay.

* *Note*: U.S. Gov’t filed an *amicus curiae* brief on behalf of Ds

* Texas allows punies in “mass tort” cases – see, e.g. Owens-Corning, supra

Mattiasovszky v. West Town Bus Co. (Ill. 1975) – Wrongful death action against bus company, whose driver killed P. Issue: are punies allowed in a wrongful death action? Ct. says no. State’s wrongful death act speaks only of compensatory damages. Thus, in interpreting statute, court rejects *statutory* basis for punies in a wrongful death case. Ct. also rejects P’s alternative argument that there is a “common law” basis for recovering punies in a wrongful death case. Ct. cites traditional argument against punies and holds that such reasons apply *a fortiori* in a vicarious liability case (here bus company, not bus driver, sued).

Punies in Contract Cases (or lack thereof):

Miller Brewing Co. v. Best Beers of Blommington, Inc. (Ind. 1993): breach of contract action involving brewer and beer wholesaler. Ct. notes general rule that punitive damages are NOT permitted in breach-of-contract cases. Ct. holds “no exception exists.” Ct. holds that, for punies, there must be an INDEPENDENT TORT (*of the type for which punies are appropriate*). P must plead and prove independent tort. Mere “tort-like” conduct in breach of contract or “bad-faith breach” not enough.

DISSENT: “[R]eprehensible behavior often defies strict tort categorization and should not go [unpunished] and undeterred merely because it fails to completely conform to the precise contours of pre-existing tort classifications.”

* Law & Economics rationale for disallowing punies in a contract case – encourage “efficient breach” and also encourage contracting without fear of punies in event of breach (i.e., encourage free enterprise system)

* Minority of jurisdictions have occasionally permitted “tort-like” conduct in contract cases to support punies, even when independent tort not pleaded or proved

CONSTITUTIONAL REVIEW OF/LIMITATIONS ON PUNITIVE DAMAGES:

* Series of US Sp. Ct. cases in 1990s – Haslip; TXO; Honda Motor Co. v. Oberg; BMW – issue in these cases concerns whether Due Process Clause requires judicial review of jury’s award of punies under a “disproportionate” test (Due Process Clause of 5th and 14th Amendments prohibit loss of property at hands of state without “due process of law”) —> including federal review of state case

– FEDERALISM CONCERNS IMPLICATED

BMW v. Gore (US Sp. Ct. 1996) (Stevens, J.): 5-4 split by Justices -- Issue is whether jury's award of \$2 million in punitive damages for BMW's non-disclosure of minor repainting of new car prior to delivery to customer was "grossly disproportionate" under Due Process Clause. Facts: pre-delivery acid rain damages to new car's paint job. BMW repainted damaged portion at cost of \$600. Loss of value of car was \$4,000. BMW did not disclose repainting to P buyer (Dr. Gore), although BMW did not affirmatively lie about it (never asked). P then sued BMW for fraudulent concealment. Jury found BMW liable for fraud; jury awarded \$4,000 in compensatory and \$4,000,000 in punies. On appeal, Alabama Supreme Court remitted damages to \$2 million.

US Sp. Ct., citing its prior cases (e.g., TXO & Oberg), first held that Due Process Clause requires judicial review of whether punies are constitutionally "disproportionate" and, thus, "arbitrary" under Due Process Clause. Ct. then set forth constitutional standard to apply in determining whether punies are in fact "disproportionate." Ct. first looked to "**legitimate state interests**" supporting award of punies (i.e., deterrence and retribution). With respect to the punishment factor, Ct. notes that Alabama court's award was based in part on BMW's repainting/non-disclosure practices in other states besides Alabama. This was problematic, the Ct. held, because many other states don't have laws against non-disclosure under these circumstances; in other words, what BMW did was not a tort in many other states. Ct. also bothered by lack of notice to BMW regarding potential for heavy punitive damages – since its practice was not *malum in se* and not a tort in many other states. In many other states that did outlaw it, there were statutory "safe-harbors" in terms of the amount of pre-delivery minor repairs that need not be disclosed to buyer.

The Court next applied a multi-factor, comparative test to determine whether \$2 million was disproportionate in light of BMW's conduct: (1) degree of reprehensibility of defendant's conduct; (2) ratio between punies and compensatory (in this case, a "breathtaking" 500:1 ratio → \$2 million: \$4K); (3) sanctions for comparable conduct (criminally and civilly, speaking) – maximum civil or criminal monetary penalties particularly relevant here.

Ct. applies these three factor and concludes that the \$2 million in punies was disproportionate under the Due Process Clause. Ct. concludes, with respect to deterrence issue, a much less severe penalty would have served state's interest in deterrence. Ct. does not draw a bright-line with respect to amount of punies that could be awarded in a case like this; simply concludes that the amount of the award crossed the line in the instant case.

DISSENTS:

Scalia/Thomas dissent: U.S. Constitution does not speak to whether a state court's award of punitive damages is "disproportionate"; so long as "some" judicial review of the issue of the excessiveness of punitive damages award, the defendant got all the process that was "due." Highly critical of majority's "substantive due process" analysis – "federal punitive damages law."

Ginsburg/Rehnquist dissent: Alabama court followed US Sp. Ct.'s recent procedural requirements

in terms of reviewing excessiveness of punitive damages award under the Due Process Clause. Federalism concerns require US Sp. Ct. to respect lower court's ruling. Critical of majority's "vague" substantive due process test.

* Procedural and substantive rights under US Sp Ct's caselaw – (a) right to judicial review of whether damages disproportionate; and (b) substantive determination of whether punies are "disproportionate"

* Slightly different 5-4 split in BMW from other federalism cases in 1990s (Kennedy & O'Connor in otherwise liberal camp; Ginsburg in otherwise conservative camp) – irony of conservatives dissenting here, when conservatives are generally more hostile to punitive damages

Statutory caps on punitive damages (Note, Casebook, at p. 1009): either in dollar amounts or in terms of ratios to compensatory damages (with rebuttable presumption of excessiveness); some states require a certain percentage of punitive damages to be paid to the state (rather than all to plaintiff)

Browning-Ferris Industr. v. Kelco Disposal, Inc. (US Sp Ct 1989) (Note, Casebook, at pp. 1010-11): Ct. held that Excessive Fines Clause of 8th Amendment does not apply to punitive damages awards in litigation involving only private parties

Norfolk & Western Railway Co. v. Hartford Accident & Indemnity Corp. (N.D. Ind. 1976) – issue raised in this case is whether as a matter of "public policy" a tort-feasor's insurance co. must pay punitive damages based on commission of tort. Ct. notes general rule against an insurance company paying damages for an insured's INTENTIONAL tort. The rationale is that punies are appropriate as a deterrent for an intentional tortfeasor. However, an exception to the general rule is that a principal/master may be liable for punies when his agent/servant – acting in the scope of the agency/employment relationship – committed an intentional tort. Here, the D railway co. was held vicariously liable for a tortious act of its agent. Thus, it would not contravene public policy to permit D's insurance co. to pay punies because D itself is not the one to be deterred by punies.

* **Restatement (2d) of Torts § 909, "Punitive Damages Against a Principal"** (Note, Casebook, at p. 1013): punies may be awarded against a principal based on tort of agent only if principal or manager thereof authorized the "doing and the manner of the act"; or principle or manager thereof was "reckless" in hiring a clearly "unfit" agent; or the agent was employed by the principal in a "managerial" capacity and was acting within the scope of the agency; or the principal or a managerial agent thereof ratified or approved the tortious act.

CLASS NOTES #21

NEW TOPIC: “Damages in Addition to or in Lieu of Equitable Relief”

ELECTION OF REMEDIES:

Johnson v. Agnew (English 1979): action based on breach of real estate contract – P vendor sued D vendee for specific performance and damages for delay. Before lawsuit could be decided, vendor’s mortgagee sold property without vendor’s consent – thus making specific performance impossible. Vendor then sought expectancy damages – i.e., balance of purchase price – rather than “delay” damages. Trial court held that expectancy damages not proper since specific performance barred. Appellate court reversed, holding that P had right to elect remedies. Specific performance is a remedy that treats contract as remaining in effect; expectancy damages treats contract as repudiated. Ct. also holds that, *ordinarily*, compensatory (expectancy) damages are measured as of date of breach, unless it would be just to look to different point in time. Here, the proper point in time is that date when specific performance became impossible.

Restatement (2d) of Contracts, § 378 (“Election Among Remedies”): party may elect one of alternative available remedies (even if they are inconsistent) – even after filing suit seeking only one type of remedy – unless other party has materially relied to detriment on the first party’s original manifestation of intent to seek only one type of remedy

Abbott v. 76 Land & Water Co. (Cal. 1911): P, vendee of land, sued D, vendor, for breach of real estate contract. In initial lawsuit, in equity, P only sued for specific performance, not damages. Trial court awarded specific performance by a certain date, although D failed to comply and was held in contempt. Ultimately, D conveys property. By the time of the conveyance, the passage of time resulted in significant depreciation of the value of the property. P then filed a second lawsuit (at law), P sued for \$ damages. Ct. rejected P’s attempt to get a second bite at apple. Although P had right to elect remedy at law over remedy in equity, P’s first suit was only for specific performance, which eventually occurred. P could have amended pleading in first suit to include damages for delay, but he did not do so. Cannot sue for delay damages now in a separate lawsuit. Only one cause of action allowed. Not a “continuous” breach. Only one breach; thus, only one lawsuit permitted.

Livingston v. Krown Chemical Manuf., Inc. (Mich. 1975): Buying co. breached agreement to buy out P’s co. P, minority shareholder, sued D’s, majority shareholder and buying co. Trial court denied specific performance after finding that P acted fraudulently as seller, but did award expectation damages. D buying co. appealed, contending that damages were improper once trial court denied specific performance on grounds that P acted fraudulently. Appellate court held that denial of specific performance on grounds of P’s fraud did not bar money damages as a matter of law. Although P’s original complaint alleged that there was an “inadequate remedy at law” in that money damages were speculative, P could amend complaint and seek money damages as an alternative remedy after specific performance was denied. A PLAINTIFF MAY SEEK INCONSISTENT REMEDIES. Ct. vacates and remands for D to have the opportunity to offer

evidence against P's claim for money damages.

* Texas' doctrine of "election of [inconsistent] remedies" is an affirmative defense that, *under certain circumstances*, bars a party from pursuing two, inconsistent remedies – see, e.g. Medina v. Herrera, 927 S.W.2d 597 (Tex. 1996)

Lewis v. North Kingstown (R.I. 1887): Ps, owners of land & building; Ds, city officials who are razing P's building during course of lawsuit. Ps sought injunction against Ds. During course of litigation, prior to issuance of injunction, Ds actually razed buildings. D then moved to dismiss equity case and contended that P's only remedy was "at law" for \$ damages (in a separate proceeding). Court held that, under equitable "clean-up" doctrine, case need not be dismissed and that chancellor had jurisdiction to award damages.

* Equitable "clean-up" doctrine – essentially meaningless today in view of (1) "merger" of law and equity; and (2) in federal cases, Supreme Court's extension of right to a jury trial (see, e.g., Beacon Theatre, etc., supra)

Cox v. City of New York (NY 1934): P sued D, railroad co., for an injunction to prevent r.r. from disturbing easements of P in a public highway. In particular, P sought to have D restore bridges that D had torn down (mandatory injunction). Over P's objection, trial ct. held that P entitled to money damages for r.r.'s private "taking" of bridges/easements. On appeal, P contended that he was forced to accept a remedy that he did not request. Appeals court affirms judgment of trial court. Holds that a court of equity possesses jurisdiction to award \$ damages in lieu of a requested injunction. Ct. recognizes that, in effect, this was an action for inverse condemnation.

* Another example of a creative remedy not requested by a court – see also Spur Development, supra – remember: equity is flexible

I.H.P. Corp. v. 210 Central Park South Corp. (NY 1963): P, lessee; D, lessor who harassed P into giving up a valuable lease. D's liability clearly established. Trial court not only granted injunction (requiring D to release), but also awarded punitive damages. Issue on appeal is whether a trial court, in addition to granting an injunction, may also award punitive damages. Ct. holds that both remedies are appropriate here. Trial court not limited to awarding compensatory or incidental damages along with injunction. Trial court may also award punitive damages where D's conduct warrants punitive damages. (Here D acted tortiously and "with malice.")

* Ct. noted that D had "waived" right to jury trial on punitive damages issue – D's failure to raise that issue in a timely manner in trial court [PROCEDURAL DEFAULT]

Hedworth v. Chapman (Ind. App. 1963) (Notes 1-2, Casebook, at 1030-31) – where reformation-of-contract (or rescission) lawsuit involved fraudulent conduct by D, trial court has authority to award punitive damages. But see Superior Constr. Co. v. Elmo (Md. 1954) – equity court may not award punies, even if injunction against malicious tort. Majority position (including Texas) seems to be that, if fraudulent conduct, punies may be awarded in a case where equitable relief sought – see, e.g.

Lesikar v. Rappeport, 33 S.W.3d 282, 300 (Tex. App. 2000)

QUESTION FOR CLASS: Isn't reformation/rescission a contract action rather than a tort action (no punies in contract cases)? No – equitable action.

NEW TOPIC: “IMPLIED” CAUSES OF ACTION (statutory and constitutional)

* Cort v. Ash (US Sp. Ct. 1975) (Note 2, Casebook, at pp. 1041-42) – sets forth 4 factors in determining Congressional intent regarding “implied” causes of action under a federal statute —> (1) is plaintiff a member of a class for whose “**especial benefit**” the statute was created? (2) any legislative intent, explicit or implicit, regarding creation of private remedy? (3) would creation of a private cause of action be “consistent” with “underlying purposes” of legislative scheme? And (4) is the cause of action traditionally a concern of state law, so that it would be inappropriate to imply a federal cause of action [federalism]

Thompson v. Thompson (US Sp. Ct. 1988) (Marshall, J.) – issue: Does Parental Kidnapping & Prevention Act (“PKPA”) provide for an “implied” federal cause of action (under “federal question” jurisdictional statute, 28 U.S.C. § 1331) to determine which of two competing state courts have proper jurisdiction under PKPA? Facts: Jurisdictional battle between two state courts (in La. and Calif.) over which court had “proper” jurisdiction in a child custody battle between divorcing spouses. “Jurisdictional stalemate.” Under PKPA, judgment of first state court with “proper” jurisdiction is entitled to *res judicata* effect. Father goes into federal court and contends that the PKPA affords him an “implied” cause of action in federal court to have the federal courts resolve the jurisdictional stalemate between the two state courts. Lower courts held that there was no such “implied” cause of action.

U.S. Sp. Ct. holds that there is no “implied” federal cause of action under PKPA. Citing Cort v. Ash, Ct. looks to “congressional intent” as the “focal point” in determining whether there is an implied cause of action. Ct. holds that this does **not** mean that there need to be direct evidence that Congress “**actually had in mind** the creation of a private cause of action.” Rather, where legislative history is silent one way or the other, the Ct. looks for “implied” intent based on language and structure of federal statute at issue “or in the circumstances of [the statute’s] enactment.” Ct. holds that there no evidence – direct or circumstantial – that Congress intended for a private cause of action under PKPA. Rather, the legislative history, language, and “structure” of PKPA – and circumstances surrounding its enactment -- all “point sharply away from” the creation of an implied cause of action.

SCALIA’S CONCURRENCE: Would abandon the “implied” cause-of-action doctrine; only Congress’ ACTUAL intent suffices. Congress, not the courts, have responsibility to determine jurisdiction of federal courts. “Distorting of the constitutional process,” whereby the legislative branch makes the laws.

Karahalios v. Nat’l Fed. of Federal Employees (US Sp. Ct. 1989) – issue: Does Civil Service Reform Act (CSRA) create an implied cause of action by union members (employees) against union for

breach of duty of fair representation? No, Ct. holds. With a few (expressly created exceptions), Congress created a remedy – an administrative one -- only in Federal Labor Relations Authority, not the courts. Even those few exceptions permitting lawsuits do not provide for suit for \$ damages. Ct. compares CSRA (and its creation of the FLRA) to NLRA/NLRB, the latter expressly creating judicial remedy for union members. Although the Sp. Ct. previously found that NLRA created an implied right of action for union members to sue for union's breach of duty of fair representation, see Vaca v. Sipes (1967), the Court refuses to do so under CSRA. Two statutes – and private and public employment – are different. No Congressional intent, express or implied, to create a private cause of action under CSRA.

Lieberman v. University of Chicago (7th Cir. 1981): Title IX sex discrimination claim by female medical school applicant who contended that she was denied admission into U of C's med school based on her gender. She sought \$ damages (not an injunction). In Cannon v. Univ. of Chicago, US Sp. Ct. held that Title IX provides a private cause of action for INJUNCTIVE relief. 7th Cir. refuses to extend Cannon to a private cause of action for money damages. Applying Cort v. Ash, 7th Cir. holds that no legislative intent, express or implied, to create damages remedy.

* OVERRULED BY SUBSEQUENT USSC CASE ???

* Issue of whether there is an implied *cause of action* is different from issue of whether there is an implied *remedy*

“BIVENS ACTION”:

* action against federal official in his or her individual capacity – not against U.S. Gov't (sovereign immunity)

* § 1983 only applies to state/local actors, not federal actors

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics (US Sp. Ct. 1971) (Brennan, J.): Ds engaged in unconstitutional arrest of P and search of P's residence. P sued for \$ damages, claiming a violation of 4th Amendment – and contending that the 4th Amendment created an “implied” federal cause of action. Ds contended that P's exclusive remedy was a *state* tort law claim for invasion of privacy. Congress silent regarding this type of remedy. But cf. 42 U.S.C. § 1983. Majority of Ct. holds that, *ubi jus, ubi remedium*. Permits a private cause of action for \$ damages directly under the 4th Amendment. Ct. remands for district court to address qualified immunity issue.

BURGER & BLACK's DISSENTS: separation-of-powers/“judicial activism” concerns (cf. Scalia in Thompson, supra) – Also, Congress clearly could create such a statutory remedy, cf. sec. 1983 actions, but Congress did not do so.

* “constitutional common law”

* 28 U.S.C. § 1331 – general “federal question” jurisdiction (“arises under” federal statute or U.S. Const.) – jurisdictional basis for Bivens and statutory “implied” causes of action

* Congress could abolish/restrict Bivens actions. Not as if there is a constitutional right to such implied constitutionally-based actions. However, Congress has never superseded Bivens by statute.

* **FEDERAL TORT CLAIM ACT (FTCA)** vs. Bivens actions

* Biven is a suit against a federal officer in his “**individual capacity**”; FTCA is a suit against Gov’t itself (even if technically against officer in his “**official capacity**”)

* Bivens involves a “constitutional tort”; FTCA involves only non-constitutional torts

*** Advantages of Bivens/Disadvantage of FTCA:

- * FTCA looks to state law based on location of tort (unlike in a Bivens action)
- * No right to jury trial under FTCA (unlike in a Bivens action)
- * No punitive damages under FTCA (unlike in a Bivens action)
- * No prejudgment interest under FTCA (unlike Bivens action)

*** What is main *disadvantage* of Bivens? Defendant may be judgment-proof. Not so with federal gov’t under FTCA. However, U.S. Gov’t is permitted – but not required – to pay money judgments against its officials in Bivens cases, see 28 C.F.R. § 50.15(a)

*** *Caveat*: under 28 U.S.C. § 2676, once a plaintiff wins a judgment under FTCA, a Bivens or other type of action against individual fed. official(s) is barred

*** *Note*: Unlike civil rights action against state actors, see 42 U.S.C. § 1988, no attorneys fees for prevailing plaintiffs in Bivens actors or FTCA cases → Contrast Equal Access to Justice Act, 28 U.S.C. § 2412 (permitting recovery of attorneys fees against U.S. Government only in non-tort cases)

* “**Costs**” generally available to successful plaintiff in FTCA and Bivens actions [“costs” generally recoverable in any case under Fed. R. Civ. P. 54(d) & 28 U.S.C. § 1920 – e.g., filing fees, witness fees, interpreter costs, copying costs (for filings), deposition costs, court reporter costs → contrast attorney “expenses,” which are not recoverable as costs (e.g., Westlaw, paralegal, attorney travel expenses)]

Davis v. Passman (1979) – further extension of Bivens to sex discrimination suit on constitutional (Due Process/Equal Protection) grounds. **Ct. holds Cort v. Ash’s “especial class” test is inapplicable** to Bivens action under Constitution. “Justiciable constitutional rights are to be enforced through the courts” in private actions for money damages/injunctive relief.

Carlson v. Green (US Sp. Ct. 1980) – extended Bivens to a private cause of action by prisoner against federal prison officials under the 8th Amendment’s Cruel & Unusual Punishments Clause – Ct. held that Federal Tort Claims Act, which provided the prisoner a *statutory* remedy, did not preempt a Bivens action under the 8th Amendment. Ct. held that the two types of claims were

“parallel, complementary causes of action.”

CLASS NOTES #22

Schweiker v. Chilicky (US Sp. Ct. 1988) – Issue: is there is a Bivens action for improper denial of social security benefits? Ct holds no. Title II of Social Security Act provided disability payments; in conjunction with states welfare agencies. Statute requires periodic review of SSI eligibility. There is administrative review of adverse decisions. Prior to 1983, recipients who were denied benefits during periodic review were permitted to keep benefits pending administrative review. That changed in 1983. Ps in this case had their benefits terminated but successfully appealed (administratively) and had benefits reinstated. Under 1983 law, they were denied benefits pending their admin. appeals; the substantial delays caused by the appeal process resulted in a tremendous hardship. Relying on Bivens, the Ps filed a federal lawsuit against Social Security and state welfare officials, alleging a **due process violations** based on numerous alleged improprieties during the initial periodic review and appeals process. Ps sought declaratory, injunctive, and monetary relief. In particular, sought compensatory (including consequential) damages (food, shelter other other necessities, as well as relief for mental anguish).

Sp. Ct. held that the Ps could not properly file a Bivens action based on alleged due process violations in SSA process. **In Bivens, Davis v. Passman, and Carlson v. Green, the Ct. determined that there were “no special factors counseling hesitation in the absence of affirmative action by Congress,” no explicit statutory prohibition against the implied constitutionally-based remedy, and no exclusively statutory alternative remedy.** In this case, however, the Court found otherwise. Majority of Ct. concludes that Congress did make purposeful decision against permitting “constitutional tort” remedies sought here. Thus, no Bivens action permitted here.

LIBERAL DISSENT (notably, including Blackmun, who dissented in Bivens 17 years earlier, cf. Callins/Furman): contends that there is insufficient evidence that Congress intended to “preempt” the field here in terms of remedies – notes that administrative remedies don’t even cover constitutional violations – notes that legislative history of SSA silent about constitutional violations

Note: MERE ABSENCE OF STATUTORY REMEDY DOES NOT MEAN AN AUTOMATIC BIVENS ACTION FOR UNCONSTITUTIONAL CONDUCT BY A GOV’T ACTOR:

* Bush v. Lucas – Bivens action disallowed – federal employee who alleged First Amendment violation in connection with his federal employment. Ct. noted that Congress had created “comprehensive procedural and substantive provisions giving meaningful remedies against the United States” as an employer. Here, the administrative process awarded the wrongfully demoted employee retroactive seniority and backpay. Admin. process did not award damages for mental anguish and attorneys fees. No Bivens action permitted.

* Chappell v. Wallace – Bivens action disallowed – African-American military personnel sued white superiors whose unconstitutional actions allegedly caused their injury in connection with military duties. Ct. noted “special nature of military life” counseled hesitation here. Also, Congress created an elaborate military justice system but failed to provide for a civil remedy for a

“constitutional tort” by a military superior. No Bivens action permitted.

United States v. Stanley (US Sp. Ct. 1987) – Issue: whether victim (former soldier) of Army’s infamous LSD tests in the 1950s may file a Bivens action (based on his discovery of the cause of actions over two decades later)? Majority of Ct. holds no. Ct. holds that military context is *sui generis*. This another case, like Chappell v. Wallace, “special factor” of military context “counseled hesitation” in the absence of affirmative action by Congress. Ct. notes that “special factor” test is separate from issue of whether a Bivens action should be barred because it is clear that Congress has considered the issue and provided for an alternative remedy. **Ct. categorically holds that “no Bivens remedy is available for injuries [constitutional or FTCA] that arise of out, or are in the course of, activity incident to military service”** – even if no alternative (admin. or judicial) remedy provided by Congress and even if something this egregious.

O’Connor dissent: “In my view, the conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission” and, thus, isn’t barred as the basis for a Biven action.

Brennan, Stevens & Marshall dissent: notes that poor plaintiff has no remedy at all – at least the serviceman in Chappell had an administrative remedy within the military justice system.

* Recent *cert. grant* on Bivens issue – whether *Bivens* action lies against private corrections corp. contracted by Federal Gov’t

Harlow v. Fitzgerald (US Sp. Ct. 1982): Bivens action (First Amendment claim) against Nixon and several members of his administration by a management analyst for Air Force who was effectively fired by administration for whistle-blowing. In companion case, Nixon v. Fitzgerald (1982), the Ct. held that the President had absolute immunity in a civil suit for damages based on his conduct while in office. Issue in this case is whether “senior aides” of President get same “absolute” immunity or some lesser type of immunity. As a general rule, Ct. holds that senior presidential aides are only entitled to qualified (“good-faith”) immunity, although Ct. leaves door open for absolute immunity where aide’s “function” was an alter-ego of President.

Ct’s discussion of qualified immunity doctrine: “good-faith” standard. **Objective and subjective components of standard** – primarily objective, however. Objective component involves “presumptive” knowledge by gov’t official of “basic, unquestioned constitutional rights” – gov’t officials “knew or should have known” of constitutional right violation. Subjective component defeats immunity if gov’t official acted with “malicious intention” to cause a deprivation of constitutional rights. “CLEARLY ESTABLISHED LAW” OBJECTIVE STANDARD

* *ABSOLUTE IMMUNITY* (judges, prosecutors, legislators – for conduct in their “judicial,” “prosecutorial,” and “legislative” functions) – President gets it, too (Nixon v. Fitzgerald), as well as “executive officers engaged in adjudicative functions” – Senior legislative aides get absolute immunity under Speech & Debate Clause

* *QUALIFIED IMMUNITY* for virtually all other federal/state/local gov’t officials (police

officers, governors, cabinet secretaries, etc.)

- * Immunity only applies to actions for money damages, not injunctions

*** IMMUNITY ISSUES TYPICALLY RESOLVED VIA SUMMARY JUDGMENT MOTIONS – plaintiff must make more than a “bare allegation” of malicious intent to defeat summary judgment

Clinton v. Jones (US Sp. Ct. 1997) (Note 1, Casebook, at p. 1097): Nixon v. Fitzgerald does not apply to “unofficial” acts of President, in this case acts that occurred *before* President took office

Davis v. Scherer (US Sp. Ct. 1984) (Note 2): fact that official conduct violates statutory or administrative rule does not defeat qualified immunity where the conduct was not in violation of a “clearly established constitutional right”

Anderson v. Creighton (US Sp. Ct. 1987) (Note 3): “level of generality” – “contours” of alleged constitutional right violated must have been sufficiently clear to provide notice to official actor that his conduct was unconstitutional

INJUNCTIONS AGAINST CRIME:

- * traditional rule is that “a court of equity will not undertake the enforcement of the criminal law” – rationale: there is an “adequate remedy at law” in criminal courts

- * equity’s purpose is not to “punish” D; it is to protect P’s rights

- * when not otherwise statutorily authorized

Gouriet v. Union of Post Office Workers (English 1977): D union threatened to engage in an unlawful strike, which, if it occurred, would be a criminal offense. P, a private citizen, sued to enjoin the D from striking. P’s suit did not allege a breach of contract or a tort. Issue is whether a court may issue an injunction against an anticipated crime when not otherwise a basis in civil law to grant injunction. Ct. notes traditional rule that courts of equity do not have jurisdiction to enjoin a crime when there is not also a “civil” wrong at issue. Ct. notes that, in this case, no “civil” wrong alleged. Thus, ct. denies injunction.

- * mere fact that defendant’s conduct at issue is a “crime” does not deprive equity court of jurisdiction to issue an injunction so long as the defendant’s conduct is also a “civil” wrong

Exception when “public interest” sufficiently endangered:

People ex rel. Bennett v. Laman (NY 1938): P sought an injunction against D practicing medicine without a license. D previously was acquitted by juries for criminal charges alleging that he practiced medicine without a license. Court here grants injunction because “public” at large was sufficiently endangered by D’s acts. Also, arguably an inadequate remedy at (criminal) law.

* courts are split on whether an injunction should be granted in this type of case

* other U.S. cases refer to exception for “widespread public nuisances” or “public emergency” (health, safety)

State v. Red Owl Stores, Inc. (Minn. 1958): civil suit filed by State against grocery store that allegedly was violating state laws against operating a pharmacy (selling, e.g., Ex-Lax, Alka-Seltzer). State did not attempt to prosecute the store in criminal court. State tried to obtain an injunction under “public nuisance”/“threat to public” exception to rule against injunctions against crime. Criminal statute here does not provide for an injunction. Ct. finds that there is an inadequate remedy at law (notwithstanding the state’s failure to prosecute) because the grocery store company operates all over the state – potential multiplicity of criminal lawsuits (with potential of inconsistent results). Injunction granted.

DISSENT: disputes “harm” to public here – also contends that majority made a premature finding of inadequate remedy at law since it has not been established that, if D were convicted in a single criminal case, D would not cease activity throughout state.

CLASS NOTES # 23

REMEDIES FOR INVASIONS OF “PERSONAL” INTERESTS:

Defamation (libel and slander) – speech that subjects a person to “hatred, contempt, or ridicule”

* At common law (in England prior to mid-1800s), truth was not a defense; today, truth is at least a “defense” in virtually all cases today; falsity is an “element” of plaintiff’s case in cases involving “public figure” or “public concern” – whether truth/falsity issue is part of plaintiff’s case or defendant’s case is an important factor at trial [contrast invasion of privacy, where truth is not a defense]

* In England today, defamation law greatly favors plaintiffs – truth is a defense in all cases, no “actual malice” requirement – much easier to win a defamation suit in England

* Texas law on defamation: much like most states today – libel vs. slander; “per se” defamation (with “presumed” damages); pecuniary damages (particularly with business defamation) and non-pecuniary damages (mental anguish, injury to reputation); punitive damages where actual malice; appears to require at least “negligence” for “private figure”/“private concern” cases

* leading Texas Supreme Court defamation case, Turner v. KTRK, 38 S.W.3d 103 (Tex. 2000)

* Compare state law “**privileges**” (good faith/ “interest” or “duty” requirements) – common law or statutory

* Perhaps strict liability survives for private/private (non-media defendants) – see Snead v. Redland Aggregates, 998 F.2d 1325, 1334 (5th Cir. 1993) – Unclear – US Sp. Ct. has never addressed this issue

* NYT v. Sullivan (US Sp. Ct. 1964): under First Amendment, “actual malice” *mens rea* required for any damages in a defamation case involving a “public official” and a matter of “public concern”
→ rationale: don’t want to restrict free flow of information

* “actual malice” includes knowledge of falsity or “reckless disregard” for truth

* clear & convincing evidence of “actual malice” required

* type of speech/type of speaker are key to First Amendment analysis – type of speech is most important, yet type of speaker matters as well

* Prior to Sullivan, US Sp. Ct. had held that states were free to regulate defamation (with respect to civil and criminal remedies) on ground that defamation was not “protected speech” under the First Amendment (Chaplinsky v. New Hampshire)

* Curtis Publishing v. Butts (US Sp. Ct. 1967) – “public figure” same as “public official” under First Amendment defamation doctrine

* Gertz v. Robert Welch, Inc. (US Sp. Ct. 1974): “actual malice” *mens rea* required for “presumed” and punitive damages in defamation case involving an issue of “public concern” if the plaintiff is a “**private figure**”; only “negligence” required for actual damages if private figure/public concern [i.e., no strict liability in private figure/public concern cases]

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (US Sp. Ct. 1985): Issue is whether Gertz’s “actual malice” requirement (for presumed/punies) applies to defamation cases not involving a matter of “public” concern or involving a “public” official/figure. Facts: False, defamatory information regarding P’s financial condition caused by D. State courts permitted presumed and punitive damages; held that Gertz was inapplicable to private figure/private concern.

Powell’s three-justice plurality: notes “the reduced constitutional value of speech involving no matter of public concern”; notes the “state interest” in presumed/punitive damages in certain defamation cases; holds that no “actual malice” required for presumed/punitive damages when private figure/non-public concern speech at issue.

Concurring opinions of Burger & White: would overrule/limit Gertz and NYT v. Sullivan

Liberal dissent (4 justices): would apply Gertz/Sullivan to any speech otherwise protected by First Amendment with respect to presumed/punitive damages

* Negligence appears to still be constitutionally required for recovery of actual damages in purely private defamation cases – see Gertz, 418 U.S. at 313 (“so long as [states] do not impose liability without fault ...”) – i.e., no strict liability in defamation cases – but see Snead, 998 F.2d at 334 – unclear; U.S. Sp. Ct. has not yet resolved this issue.

* Most states, including Texas, require only negligence for recovery of actual/presumed damages in private figure/non-public concern cases – see, e.g., Foster v. Laredo Newspapers, 541 S.W.2d 809 (Tex. 1976)

Equity’s Power to Enjoin Defamation:

Mazzocone v. Willing (Pa. Superior Ct. 1976), rev’d 393 A.2d 1155 (Pa. 1978): Crazy client picketed law firm that had formerly represented her in a defamation case; picket contained defamatory false allegations; trial court enjoined her from demonstrating/picketing against law firm and from defaming the firm. On appeal, issue is whether equity court has power to enjoin defamation. Traditional view is that equity only protects “property” rights, not “personal” rights. First Amendment concerns, too, because injunction by equity court is a form of prior restraint before jury has had a chance to decide defamation issue.

Pa. Superior Court (first round of appeal) held that trial court’s injunction was proper.

Inadequate remedy at law, in that defendant was judgment-proof and it would require a multiplicity of lawsuits to stop her. Damages also difficult to calculate here. Superior court modifies terms of injunction to only apply to defamatory picketing, not all picketing. Dissenting judge takes position that equity does not have the power to enjoin defamation.

Pa. Supreme Court, 4-3, reverses Superior Court. Holds that there is an adequate remedy at law (damages) and that injunction was an unconstitutional form of prior restraint.

* Texas law strongly opposed to injunctions against defamation unless clear and present danger – see, e.g., Hajek v. Bill Mowbray Motors, 647 S.W.2d 253 (Tex. 1983) (“they sold me a lemon” written all over car; Sp Ct vacated injunction) (citing Tex. Const. art. I, sec. 8)

Organization for a Better Austin v. Keefe (US Sp. Ct. 1971): P, real estate broker who, according to D, racially “block-busted” (racial scare tactics) with intent to promote racial segregation. In response, D, local civil rights group, distributed leaflets critical of P’s alleged block-busting and which gave out P’s home phone number. State court enjoined D from distributing leaflets or literature “*of any kind*” in town and from demonstrating against P “*anywhere*” in the town. State court found that D had invaded P’s right to privacy and found that D’s actions were “coercive” and “intimidating” based on D’s giving out P’s home phone number. Citing its 1931 decision in Near v. Minn. US Sp. Ct. vacated state court’s overbroad injunction on the ground that it was an impermissible form of unconstitutional “prior restraint.” Court noted that D’s leafleting was “peaceful”; mere fact that D attempted to “influence” P was not sufficient to permit prior restraint. Injunction here was not aimed at distribution of P’s home phone; rather, it was aimed at public criticism of P. “No prior decisions [of Supreme Court] support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.”

* “HEAVY PRESUMPTION” against prior restraints under First Amendment – the speech at issue, however, must be “arguably protected speech”

* of course, P in this case could sue for \$ damages in a defamation suit

NYT Co. v. United States (US Sp. Ct. 1971) (Note 1, Casebook, at p. 1129): “Pentagon Papers case” -- Sp. Ct. struck down, as impermissible prior restraint, lower court injunctions barring *NYT* from publishing classified study of Vietnam War. Ct. didn’t foreclose criminal prosecution, just the prior restraint.

Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations (US Sp. Ct. 1973): Sp. Ct. approved of an injunction against employment ads that explicitly discriminated based on sex in violation of a local anti-discrimination ordinance. Commerce speech at issue. Ct. held that this injunction was not an impermissible form a prior restraint because commercial speech here was presumptively illegal.

Zauderer v. Office of Disciplinary Counsel of the Ohio Supreme Court (US Sp. Ct. 1985): Ct. holds that “commercial speech” is entitled to some, albeit less, protection under First Amendment.

Injunctions against false, deceptive, or misleading – or otherwise illegal -- commercial speech are permitted. Injunctions against non-illegal or non-misleading commercial speech, to pass constitutional muster, must be supported by a “substantial” governmental interest. Here, Ct. strikes down injunction against attorney price advertising and truthful descriptions of their fields of interest as not being supported by such a substantial gov’t interest.

Birnbaum v. United States (E.D. N.Y. 1977) (Weinstein, J.): Federal Tort Claims Act case where court used an advisory jury on damages issue – CIA’s warrantless opening/copying of private mail during 1950s-70s (200,000 pieces of mail; list of 1.5 million names collected). Individual plaintiffs sought money damages from U.S. Gov’t based on CIA’s invasion of their privacy. NY invasion-of-privacy law applicable under FTCA. Main issue is measure of damages for this tort. Damages are to individual plaintiffs, not society as a whole. Abstract, not concrete, injury. Non-pecuniary in nature. Ct. holds that “lack of objective harm . . . is not bar to recovery.” Law recognizes some type of money damages for invasion of privacy, as well as for plaintiff’s provable mental anguish. Difficulty in valuation of such abstract harm. Advisory jury recommended \$5,000 for each plaintiff. Ct. awards \$1,000 per plaintiff, contingent upon Gov’t’s apology letter to each plaintiff.

* On appeal to the 2nd Circuit, appeals court held that apology letter was not an appropriate remedy under FTCA, yet affirmed \$1,000 damages – distinguishes Carey v. Piphus, *supra*, on ground that plaintiffs proved actual mental anguish; more than nominal damages appropriate

Jonap v. Silver (Conn. 1984): tortious appropriation of one’s name & tort of placing plaintiff in a “false light” – damages for these two torts are the same; no double recovery

Zacchini v. Scripps-Howard Broadcasting Co. (US Sp. Ct. 1977): “human cannonball” case – Over P’s objection, t.v. reporter from D filmed P’s circus act and ran 15-second (favorable) story on nightly news, which showed P’s entire act. P sued in state court for tort of unlawful appropriation of P’s “professional property”/right of publicity. *P did not sue for prior restraint (injunction); only sued for \$ damages.* Ohio Supreme Court threw suit out on First Amendment grounds. Issue: did First Amendment immunize D from suit for damages? US Sp. Ct. holds that First Amendment didn’t give media right to show P’s entire act – no *carte blanche* “media privilege” under First Amendment. Ct. notes “substantial” state interest in protecting performers here. Akin to copyright or other intellectual property protection under the law. No prior restraint issue here; just money damages.

* Ct. noted that a state court, as a matter of state law, may provide a “privilege” to the media under these circumstances – simply not required by the First Amendment

* **Four main species of “privacy” torts:** (1) “false light”; (2) intrusion into privacy; (3) appropriation of name or likeness for commercial advantage; (4) disclosure of “private details” about a non-newsworthy person or event.

* Texas law: doesn’t recognize “false light” tort, *see Cain v. Hearst Publish.*, 878 S.W.2d 577 (Tex. 1994) (such a claim must be brought as defamation)

* Time Magazine v. Hill (US Sp. Ct. 1967) – “false light” First Amendment case – Relying on NYT v. Sullivan, Ct. held that, in order to recover damages for a “false light” tort concerning an issue of “public concern,” a plaintiff must show at least recklessness by defendant.

Chappell v. Stewart (Md. 1896): P alleged that D trailed him with private eyes. Alleged social and economic harm resulted. P sought injunction. Ct. notes that equity concerned only with injury to property rights rather than interference with “personal” rights. Ct. applies traditional rule and denies injunction. Ct. leaves open money damages as a remedy in an action at law.

Galella v. Onassis (2d Cir. 1973): Case of the Jackie O paparazzi – successful counter-claim for invasion of privacy/emotional distress by Jackie O. Paparazzi harassed, annoyed Jackie O and John-John and Carolyn. Trial court granted prelim. injunction against paparazzi, which he violated during trial. Although Jackie O a “public figure,” ct. found that First Amendment or non-constitutional “media privilege” did immunize paparazzi from damages/injunction. Ct. found that paparazzi’s action went well beyond “news-gathering privilege.” **“Crime and torts committed in news-gathering are not protected.”** On appeal, second circuit simply MODIFIED INJUNCTION, finding it was somewhat overbroad. *Inter alia*, ct. permits D to continue to photograph Jackie O and family and sell such photos and “report” on the family. Injunction against conduct that foreseeably would harm Jackie O or kids, getting too close to her, and harassing her.

* One wonders if Bill Clinton would fare as well

Familial Interests/Issues:

Baumann v. Baumann (NY 1929): P sued to have court declare her husband’s purported divorce (in Mexico) and re-marriage to another woman null and void. Trial court issued such a declaratory judgment based on prevailing NY matrimonial law. Trial court further enjoined husband and purported second wife from “holding themselves out” as husband and wife and from claiming that the husband had divorced the first wife; court also enjoined husband from remarrying during P’s lifetime! Appellate court affirms declaratory judgment, but vacates injunction. Equitable relief not appropriate. Equity does not protect hurt feelings (“personal” rights). Only protects property rights, which declaratory judgment adequately did. Dissenting judge would affirm trial court’s expansive exercise of equity.

Mark v. Kahn (Mass. 1956): P, ex-husband of D, sued for an injunction to prevent D from registering their children in school under last name of D’s new husband. Finding that the D was solely motivated by hostility toward P, the trial court granted injunction. Threshold issue is whether equitable jurisdiction even exists here. Rejecting traditional approach that equity only protects “property rights,” appeals court holds that an injunction may be appropriate. Vacates and remands for trial court to apply a multi-factor test, which primarily looks to whether name-change would be in best interest of the children.

In re Marriage of Schiffman (Cal. 1980): Trial court granted a divorce, but legally changed baby’s name to the father’s name even though the mother was awarded custody (over mother’s objection).

Trial court also enjoined mother from changing baby's last name from father's last name. Appeals court looks to traditional, antiquated reasons for paternal surname. Ct. abolishes old common-law rule that required baby to get paternal surname. Vacates and remands for determination of whether paternal surname is in best interest of child.

CLASS NOTES # 24

Familial Interests Con't ...

Blazek v. Rose (Ill. 1922): Simese Twins case – P, one of one of twins, sued D, for commercial exploitation of his likeness by using his photo in an ad. Injunction granted.

In re Sampson (NY 1972): Ct. affirms trial court's order that minor child be operated on over parent's objection – need not be a "life-threatening" situation; rather, only need be a "serious physiological impairment."

Cruzan v. Director, Mo. Dep't of Health (US Sp. Ct. 1990): issue here is whether, under the Due Process Clause of the 14th Amendment, a state may require "clear and convincing" proof of comatose adult patient's desire to end life-support. Mo. cts. refused to order that life support be terminated because state trial court did not find "clear and convincing" proof of Nancy Cruzan's intent. No living will. Only parol evidence. Ct. looks to state interest in preserving life vs. comatose patient's "liberty interest" in ending unwanted treatment. Majority of Court held that state's "clear & convincing" standard-of-proof was constitutionally adequate in view of both interests. In addition, Ct. held that Constitution does not require states to repose life-or-death decision in comatose adult patient's guardian.

* Presumably, if guardian establishes patient's wish to pull the plug by C & C evidence, the Const. would require state to respect "right to die" – thus, Cruzan is only indirectly a "right to die" case

* lesson here: sign a "living will" – Texas statutory form available (directive to physician; durable power of attorney, including for health care)

SCALIA's concurrence: U.S. Const. has no role in this case – solely a matter for states

LIBERAL DISSENT: would strike down C & C evidence as unconstitutional in view of fundamental "liberty interest" in refusing unwanted medical treatment

WHAT STANDARD DOES TEXAS APPLY? RESEARCH

Educational Interests

Lesser v. Bd. of Educ. of City of NY (NY 1963): Brooklyn College (state school) denied P's son's admission into college. Mother sued to force college to "review" boy's scholastic records and "make

corrections” in terms of giving boy weighted GPA for his AP classes. Trial court granted injunction; appellate court rev’d. Appellate court held that trial court was without power to grant such an injunction. Ct. applied traditional extreme deference to educational institution – educational “discretion” recognized. Ct. held that it may only correct truly “arbitrary” or “discriminatory” exercise of educational discretion. Not the case here.

Goss v. Lopez (US Sp. Ct. 1975): § 1983 civil rights action by suspended students against Ohio public schools, who suspended the students in violation of **procedural due process**. Students were not given a pre-suspension hearing or a hearing within a reasonable time after suspension. Dist. court held that school system had violated due process and issued a mandatory injunction ordering the school to remove suspension from students’ records. Sp. Ct. affirms. Ct. recognizes that public school students possess a constitutionally-protected “property interest” in their public education. Thus, under DP Clause, public school cannot arbitrarily deny that property interest without due process. Rudimentary elements of due process include: (1) prior notice and (2) right to be heard. Neither occurred here. “SOME KIND OF HEARING REQUIRED.” It may be informal, Ct. states. Depending on circumstances, a post-suspension hearing is appropriate under Constitution. Longer suspensions (and expulsions) may require greater formality.

CONSERVATIVE DISSENT: no constitutionally-protected interested violated here

Bd. of Curators of U of Mo. v. Horowitz (US Sp. Ct. 1978): § 1983 action – **procedural due process claim** – P, a medical student, sued state medical school for dismissing her in her final year for failure to satisfy academic standards. Facts: several critical evaluations of P’s academic performance, which led to school dismissing her. Various in-school administrative appeals by student denied. Sp. Ct. held that the student received all the “process” that she was “due”; indeed, she received more due process than required. Ct. held that, when dismissal is based on “academic” reasons rather than for “misconduct,” ordinarily no need for “some type of hearing.” Thus, Goss distinguishable because suspension was based on alleged student “misconduct,” not for “academic” reasons. “Subjective” nature of academic assessment; more objective nature of misconduct assessment.

* TREMENDOUS JUDICIAL DEFERENCE TO EDUCATIONAL INSTITUTIONS (at least in their “academic” function)

Regents of U of Mich. v. Ewing (US Sp. Ct. 1985) (Note, Casebook, at p. 1198): rejected student’s **substantive due process** claim that he was entitled to re-take an exam and that he should not have been dismissed. Noting judicial deference to academia, Ct. held that it was even less willing to use “substantive due process” to regulate state academic institutions. Ct. didn’t rule out that there could be some substantive due process violation depending on the facts.

* recognizes that “academic freedom . . . [is] a special concern of the First Amendment”

* procedural vs. substantive due process

Tedeschi v. Wagner College (NY 1980): P, very mixed-up student with serious academic and social problems at her **private college**, harassed a professor. P refused D school administration's offer to meet with her informally, to discuss problems prior to making decision regarding suspension. School officials then suspended her for her misconduct. School never followed its own guidelines, which required a formal hearing and findings by Student/Faculty Hearing Board. P then sued for a mandatory injunction (i.e., reinstatement) and also for \$ damages. Although not a due process case – since it was a private school – NY Court of Appeals held that the **contractual** nature of relationship, or the “**associational rights**” involved between private school and student, required school to follow its own guidelines. “Implied” contract here. Ct. issued injunction (really specific performance) requiring school to follow its own guidelines.

* cf. Dalton v. ETS (violation of implied covenant of GF/FD – contractual “procedural” d.p.)

Olsson v. Bd. of Higher Educ. (NY 1980): P, graduate student at John Jay College of Criminal Justice, a state school, sued school based on a professor's erroneous statements about “comp” exam, upon which the P had relied to his detriment. P failed to pass exam based on professor's actual grading formula. P “appealed” within school, requesting that he be passed based on his actual; school only offered him an opportunity to re-take exam. P sued for an injunction requiring school to award his diploma under an “estoppel” theory. P prevailed in lower courts. N.Y. Court of Appeals rev'd, citing tremendous judicial deference to academic discretion. Here, school did not act arbitrarily; P was offered opportunity to re-take test. No bad faith by school.

Professional/Social Interests – “Associational” Rights:

Rigby v. Connol (English 1880): P, a worker expelled by his trade union, sued for reinstatement to membership. Ct. dismissed bill in equity on the ground that there was no “equity jurisdiction” since P only sought to enforce “personal” rights. Not as if P shared in any property rights owned by union.

* This case represents traditional view

Falcone v. Middlesex County Medical Society (NJ 1961): P doctor sued to be admitted into local medical society. P had been denied membership wrongly according to written rules of society. Society refused him membership under an unwritten rule. P sought mandatory injunction, which D society opposed on ground that it was a “voluntary” organization and that P had no judicially-enforceable right to membership. Trial court ruled for P, finding that the D Society had virtually monopolistic control of the practice of medicine. Trial court also found that denial of membership would have “serious” economic impact on P, in that he would be denied privileges to local hospitals. Appellate court affirmed. Ct. found that this association was a professional association (more akin to a trade union) than a true “fraternal” or “social” organization. Thus, under the “law of associations,” P had “**associational rights**” that could not be arbitrarily infringed. “Public” interest in promoting such associational rights.

* This case represents modern trend in the law

* Not a constitutional holding – rather, common-law “policy” holding

Blatt v. USC (Cal. 1970): – private law school -- P, USC law student, sued Order of the Coif to admit him. P was ranked 4th in class. Originally, when P started law school, O of C’s admission standard was top 10% of class. Yet policy later changed to require top-10% students to accept position on *Law Review* and complete their assignments successfully. P alleged that this change was arbitrary and discriminatory and violated his associational rights. Ct. rejects his argument, finding that Order of the Coif was not like a trade union or medical society. Denial of membership, while it may impact his future career to some degree, “does not affect his basic right to earn a living.” More arbitrariness required for judicial intervention into academic realm.

Rotary Internat’l v. Rotary Club of Duarte (US Sp. Ct. 1987) – Issue: does state statute that requires Rotary Club to admit women violated the “associational rights” of Rotary Club under the First Amendment? Ct. holds no. Ct. notes two aspects of First Amendment “right to association”: (1) unjustified governmental interference with an individual’s choice to enter into private relationships; (2) freedom of individuals to associate for the purpose of engaging in protected speech or religious activity.

With respect to first type of associational right, the test in determining whether a particular association of individuals may be regulated by gov’t looks to whether the association is “intimate” or non-intimate. Factors here include size of group, selectivity, purpose for associating, and whether others (besides group at issue) are excluded. Rotary fails this test – other than excluding women as members, Rotary is wide-open to the public. With respect to the second type of associational right, the test is whether gov’t regulation would frustrate the social/religious/cultural purpose of association. Rotary’s ban on female members fails this test as well.

In addition, there is a “compelling state interest” in eliminating gender discrimination. First Amendment right is not absolute. Balancing required. Moreover, the anti-discrimination statute is “view-point neutral.”

* Roberts v. Jaycees (US Sp. Ct. 1984)

Cleveland Bd. of Educ. v. Loudermill (US Sp. Ct. 1985) – Issue: what type of process is due to a public employee can be discharged only “for cause”? Public school employee sued school for terminating him based on his lie about his prior criminal record. Ct. recognizes that state civil service statute created a “property right” in plaintiff’s employment by permitting discharge only “for cause.” Ct. held that, as a matter of basic due process, a public employee is entitled to: (1) pre-termination notice of grounds; and (2) opportunity to be heard (“some type of hearing”) and some type of meaningful post-termination administrative review. Need not be an elaborate pre-termination hearing. Here, Ohio statute provided all the process that was due.

* TEXAS’ “AT-WILL” EMPLOYMENT DOCTRINE: Harsh – for “good cause, bad cause, or no cause at all” – only exception is if employee fired solely because he refused to perform an illegal act – covenant of gf/fd does *not* apply to “at will” employment relationship in Texas

* **Public** employees in Texas subject to “at will” doctrine – generally no procedural due process protections – recurring “employment handbook” situation

* federal and state anti-discrimination statutes, of course, limit at-will employment doctrine

Redgrave v. Boston Symphony Orchestra, Inc. (1st Cir. 1988) (en banc): Vanessa Redgrave was initially hired to narrate for Boston Symphony; later the BS reneged on the contract because of public complaints based on Redgrave’s support of P.L.O. and her negative comments about Israel. Redgrave then sued the symphony. In addition to seeking contract price, she also sought consequential damages for loss of professional opportunities that resulted from BS’s breach. Jury verdict for Redgrave on both expectancy damages (benefit of bargain) and consequential damages (lost professional opportunities). There was a factual finding that BS’s actions were not motivated by Redgrave’s views – rather, BS was motivated by fear of Redgrave’s critics who might take their wrath out on BS. Based on this finding, the trial court vacated consequential damages award on First Amendment grounds after finding that her theory of consequential damages was based on premise that BS’s viewpoint discrimination harmed her professional status. 1st Circuit rev’d district court’s First Amendment judgment vacating jury’s award of consequential damages. Ct. held that BS’s actions not “communicative” – i.e., not “expression” or “speech” within the meaning of the First Amendment and, thus, not constitutionally-protected. Therefore, Redgrave’s consequential damages claim only subject to normal Hadley limitation.

1st Cir. held that Redgrave’s consequential damages claim was not simply an allegation that BS’s breach of contract generally hurt her “professional reputation” (which would fall outside of Hadley’s ambit); rather, ct. held that her claim was that she lost **specific, identifiable business opportunities**, which loss was a reasonably foreseeable consequence of BS’s breach of contract. In reviewing evidence, 1st Cir. held that Redgrave had only identified only one such lost business opportunity, which was worth \$12,000 (minus expenses). Ct. thus vacated jury’s \$100,000 consequential damages award and remanded for reassessment of consequential damages.

* 1st Cir. also dealt with Redgrave’s First Amendment-type claim under Mass. civil rights statute (that applied even without “state action”) – Ct. held that her state law civil rights claim failed, so court did not address First Amendment challenge to state civil rights statute

CLASS NOTES # 25

ATTORNEYS' FEES:

* **“American Rule”**: with a few specific exceptions, prevailing party in civil litigation may not recover attorneys’ fees unless specific statutory provision for attorneys’ fees (e.g., 42 U.S.C. § 1988)

* **Criminal law** variation of American Rule – exception for “bad faith” criminal prosecution of innocent person – federal law (Hyde Amendment) and many states, see Restatement (2d) of Torts, § 671 (attorneys’ fees expended on criminal defense recoverable in a separately-filed malicious prosecution action) – Texas appears to follow this exception to the rule

* American Rule vs. English Rule

* Texas law presentation

* Tex. Civ. Prac. & Rem. Code § 38.001

* Some jurisdictions provide that attorneys fees cannot be awarded when the defendant is a governmental entity, unless statute expressly provides for such (same with prejudgment interest and punitive damages, see infra)

Alyeska Pipeline Service Co. v. Wilderness Society (US Sp. Ct. 1975): P environmental law group successfully sued Secretary of Interior and pipeline co. Lower court awarded P attorneys’ fees as part of court’s “equitable power” under a “private attorney general” theory. US Sp. Ct. reversed, holding that, except for a few well-established exceptions to the American Rule, only the legislature may permit the prevailing party to collect attorneys fees. Here, no statute provided for attorneys fees. No common law exception applied either.

* Ct. discusses “bad faith” & “common fund” exceptions to American Rule

* under Erie, in diversity cases, federal courts typically must follow state substantive law governing the award of attorneys’ fees if there is a conflict with federal law

Fogerty v. Fantasy, Inc. (US Sp. Ct. 1994): Copyright Act litigation. P sued John Fogerty, alleging copyright infringement. Fogerty, the defendant at trial, won. He then sought attorneys’ fees under statutory provision awarding attorneys’ fees to the “prevailing party” in a copyright case (statute written in discretionary terms). In denying attorneys’ fees to Fogerty, lower court applied the “dual standard” to his case: prevailing plaintiff generally always awarded attorneys’ fees; prevailing defendant not awarded attorneys’ fees unless plaintiff’s suit was frivolous or brought in “bad faith.” Ct. rejects application of “dual standard” policy in copyright context. Not like civil rights cases, where plaintiffs tend to be indigent. Instead, court applies “evenhanded approach.” Ct. looks to discretionary language of statute and remands for exercise of district court’s discretion.

* Dual standard applicable to civil rights cases – US Sp. Ct.’s Christianburg Garment Co. v. EEOC (1978) – rationale: Congress’s clear policy to encourage “private attorneys general” in civil rights cases

Chambers v. NASCO, Inc. (US Sp. Ct. 1991) – Issue: may a federal district court, as part of its “**inherent authority**,” award attorneys’ fees as a sanction for a litigant’s “bad faith” conduct during litigation? Ct. holds yes. Clearly bad faith and unethical conduct by litigant – effort to frustrate trial court’s TRO and award of specific performance and intentional withholding of information from court during a hearing. Obstructionist conduct continued throughout course of litigation. Warnings from court ignored. Appeal to 5th Cir. dismissed as “frivolous.” 5th Cir. awarded attorneys fees to plaintiff-appellee and remanded for dist. ct. to award plaintiff attorneys/expenses fees as well. Because district court’s ability to award attorneys fees under Fed. R. Civ. P. 11 was limited to party’s or attorney’s signature on baseless pleadings, district court awarded attorneys fees/expenses for defendant’s entire course of conduct under its “inherent” authority. (Rule 11 didn’t cover all the misconduct here.) Likewise, 28 U.S.C. § 1927, which permits attorneys fees sanction for vexatious conduct, only applies to *attorney* conduct, not conduct by *parties*. Thus, ct. proceeded under its “inherent” authority to sanction. US Sp. Ct. affirms sanction of attorneys fees against a party under district court’s “inherent” authority. Congress did not preempt the field by enacting Rule 11 and § 1927. So long as district court gave sanctioned party due process – prior notice & opportunity to be heard – appellate court would apply only abuse-of-discretion standard on appeal. Ct. also affirms sanction in form of attorneys’ fees for conduct outside court proceedings so long as such conduct “related” to judicial proceedings (in this case, bad faith conduct before FCC in related administrative proceeding).

SCALIA’S DISSENT: would limit “bad faith” sanction under court’s “inherent authority” to conduct within confines of court proceeding *and* which actually interfered with proceedings – would not apply such sanctions to prelitigation conduct and conduct outside confines of court/pleadings. Majority subverted American Rule, according to Scalia. Judicial activism. Leave it to the legislature.

* Contrast Bauguess v. Paine (Cal. 1977) (Note 1, Casebook, at p. 1263): California did not approve such an “inherent authority” award of attorneys fees as a sanction – only if statutory authorization for it

* Bauguess superseded in Cal. Code Crim. P. § 128.5

Boeing Co. v. Van Gemert (US Sp. Ct. 1980) (Note 2): “common fund doctrine” – litigant or lawyer who recovers a “common fund” for the benefit of other persons besides lawyer or litigant is entitled to a reasonable attorneys’ fee from the fund – typically class-action suits – quantum meruit rationale.

Brandt v. Superior Court (Cal. 1985) – Issue: whether, in a case of a “bad faith” denial of insurance benefits by an insurance co. (**tort in a contract setting**), may the insured/plaintiff recover reasonable attorneys fees spent to recover wrongly-withheld insurance proceeds? Yes, ct. holds. Attorneys’ fees were a “proximate cause” of the tort of bad-faith denial of insurance proceeds. Not attorneys’ fees-*qua*-attorneys’ fees. Similar to cases holding that past attorneys’ fees may be recovered in false

arrest/malicious prosecution cases.

* Note: this was not a mere breach of insurance contract – this was a *tort case*; attorneys fees not ordinarily awarded in cases of “bad faith” breach-of-contract cases

Equitable Lumber Corp. v. IPA Land Development Corp. (NY 1976) – Issue is whether a provision in contract providing that breaching party must pay non-breaching party’s attys’ fees enforceable? Also, related issue is whether the provision – stating that fees would be liquidated as 30% of damages – was enforceable as written. Ct: such provisions generally enforceable, if **expressly provided for in contract**, unless a “penalty” or “unconscionable.” Not unconscionable here. Appellate court vacates and remands for determination of whether 30% liquidated figure is a “reasonable” provision or an unreasonable penalty.

* Statutory provisions governing contractual provisions for atty fee shifting (Note, Casebook, at p. 1272-73): Cal. provides that if a one-sided fee-shifting provision in contract, then law treats it a reciprocal provision applicable to which party is the “prevailing” party

Rosenberg v. Levin (Fla. 1982) – Issue: what is the proper measure of damages for an attorney discharged *without cause* who has performed “substantial” legal services at time of discharge? Ct. holds that a lawyer under such circumstances is permitted to recover “reasonable value” of his services under quantum meruit theory, yet recovery is limited to maximum amount under the breached contract. If the contract was a contingency fee agreement, then discharged lawyer cannot sue for quantum meruit recovery until contingency occurs (i.e., former client wins lawsuit). Ct.’s “policy” here is permitting a *client’s freedom of choice* in retaining an attorney.

* jurisdictions split here – some jurisdictions permit recovery of full contract price; others allow quantum meruit recovery even if it exceeds contract price (whether contract price or contingency fee scenario)

Texas Indep. Teachers Assoc. v. Garland ISD (US Sp. Ct. 1989): 42 U.S.C. § 1988 – What does “prevailing party” mean? Teachers union won a portion of their civil rights lawsuit against the school district. Lower courts held that partial success in litigation was not enough to qualify as “prevailing party” under fee-shifting statute. US Sp. Ct.: so long as plaintiff won on a “**substantial claim**” – even if not the “primary” claim – then plaintiff is the “prevailing party.” A plaintiff is a prevailing party if he succeeded on “**any significant issue in the litigation which achieves some of the benefit**” that the plaintiff sought in bringing the lawsuit. There must be a “**material alteration in the legal relationship of the parties**” in order for there to be a “substantial” claim. Ct. rejects the lower court’s “central issue” test. Ct. refers to “substantial claim” test as a “generous formulation” for plaintiffs in civil rights cases.

Hewitt v. Helms (US Sp. Ct. 1987) (Note 1, Casebook, at p. 1283): where civil rights plaintiff lost him money damages claim on immunity grounds and where he failed to seek declaratory/injunctive relief, he was not a “prevailing party” entitled to attorneys’ fees

Rhodes v. Stewart (US Sp. Ct. 1988) (Note 2): civil rights plaintiff who was denied relief on

mootness grounds not a “prevailing party” entitled to attorneys’ fees

Kay v. Ehrler (US Sp. Ct. 1991): Is an attorney who represents himself as a *pro se* litigant in a civil rights action – and wins case -- entitled to attorneys fee? No, Sp. Ct. holds.

* non-lawyer who successfully represented self *pro se* also not entitled to attorneys’ fees

Missouri v. Jenkins (US Sp. Ct. 1989) (Note 1, Casebook, at p. 1286): Under § 1988, a court also should award to prevailing plaintiff separately-billed paralegal and law clerk hours

West Va. Hosp. v. Casey (US Sp. Ct. 1991) (Note 2): § 1988 doesn’t include expert witness fees

* *Note*: This case was SUPERSEDED by statute in 1991 Civil Rights Act’s amendment to § 1988, adding new subsection (c)

Pennsylvania v. Delaware Valley Citizens Council for Clean Air (US Sp. Ct. 1986): Clean Air Act litigation by private environmental law group, which prevailed in federal district court. Nine separate “phases” of protracted litigation (including ancillary administrative proceedings). Dist. Ct. awarded attorneys fees under Clean Air Act’s provision for such based on a “**lodestar**” formula, which using a “multiplier” upwardly adjusted amount of attorneys fees per hour based on difficulty of work/expertise of attorney and also “risk” (of losing) at outset of litigation. Dist. ct. also awarded attorneys fees for plaintiff’s appearance at related administrative hearings.

1986 Decision: Sp. Ct. affirms award of attorneys’ fees for directly “related” administrative proceedings. Ct. holds that, as a general matter, a dist. ct.’s upward adjustment formula should be “rare” and only for “exceptional” cases. Presumption that “lodestar” amount is sufficient indicium of what is “reasonable” attorneys’ fee. Ct. holds that district court’s multiplier based on quality of counsel/difficulty of work was improper since not an “exceptional” case of superior attorney performance.

1987 Decision (after re-argument): 4-1-4 ideological split among Justices on issue of whether an upward adjustment may be made based on the “risk” that the plaintiff’s attorney faced in litigation.

4-conservative-Justice (White et al.): not wanting to encourage “public interest” litigation, the plurality, plurality generally rejects plaintiff’s attorney’s “risk”/“contingency” in lawsuit as a basis for an upward adjustment of lodestar; must be a truly “exceptional” case. States that Congress did not intend risk to be a basis for upward fee adjustments under § 1988.

O’Connor’s pivotal concurring opinion: agrees with dissent that Congress did not rule out risk as a basis for an upward adjustment, but states that district court must make specific findings showing that, in the relevant local legal market, risk would have resulted in greater attorneys’ fees in a privately-retained case. Here district court improperly relied on “case-specific” risks rather than market-wide risks.

4-liberal-Justice dissent (Blackmun et al.): wanting to encourage “public interest” litigation, the dissent stated that Congress did intend risk to be a basis for an upward adjustment as a matter of factoring in “market forces.” Failure to increase court-awarded fees to reflect such risk fails to compensate plaintiff attorney based on real value of his legal services. Effect is to discourage public interest litigation. Dissent would vacate and remand for district court to make new findings justifying award enhancement for risk.

*** NOTE: In **City of Burlington v. Dague**, 505 U.S. 557 (1992), a majority of the Court adopted plurality’s position and rejected O’Connor’s concurring opinion

* Dague has been rejected by many state courts on state law grounds

* This case has implications for other “public interest” cases, including civil rights cases

City of Riverside v. Rivera (US Sp. Ct. 1986) – Issue is whether attorneys fees under § 1988 that are larger than the damages awarded are *per se* “unreasonable”? Ct., in 4-1-4 decision, holds no. Here dist. ct. awarded \$246K in attorneys fees in a civil rights case even though jury only returned a verdict for \$13K on plaintiffs’ federal constitutional claims. Majority of the Justices reject a “proportionality” requirement between damages and attorneys fees. Majority stated that Congress’ purpose in enacting § 1988 was to displace private market in order to encourage private enforcement of civil rights statutes. To require proportionality would frustrate this purpose.

Powell’s pivotal concurring opinion: although he rejects a strict proportionality test, Powell states that, ***ordinarily***, attys fees should NOT exceed amount of damages absent some “powerful factor” justifying such (factor in this case proof of pattern of patently unconstitutional conduct by police officers)

Conservative dissent: refers to majority’s application of § 1988 as a “relief act for [civil rights] lawyers” – Dissent would apply a strict proportionality test

*** NOTE: In **Farrar v. Hobby**, 506 U.S. 103 (1992), a plurality of the Court stated that ordinarily attorneys fees should not be awarded under § 1988 when the jury or court only awards nominal compensatory damages (without any declaratory/injunctive relief or punies).

* **O’Connor’s pivotal concurrence in Farrar** stated that attys fees may be awarded if only compensatory damages, so long as a “public purpose” is served by the litigation and constitutional violation was not *de minimis* or “technical” – lower courts have followed O’Connor’s position, *see, e.g., Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074 (10th Cir. 1999)

Blanchard v. Bergeron (US Sp. Ct. 1989) (Note 1, Casebook, at p. 1313): even if civil rights plaintiff had a contingency agreement with his attorney limiting attorneys fees to a specific amount or percentage, district court may award more than that amount under § 1988

* Even *pro bono* lawyers may recover attorneys fees under § 1988

Venegas v. Mitchell (US Sp. Ct. 1990) (Note 2): a civil rights plaintiff's contingency fee agreement with his attorney – providing for a certain % of damages as the attorney's fee – is independent from the amount of attorneys' fees awarded under § 1988. Thus, if § 1988 fees less than the % agreed to, the plaintiff must make up the difference and pay attorney. Section 1988 award does not "cap" the amount that the plaintiff must pay his attorney.

Evans v. Jeff D. (US Sp. Ct. 1986) (Note 3): a provision of a civil rights settlement that requires the plaintiff to waive right to collect attorneys' fees under § 1988 is enforceable – it doesn't create a conflict-of-interest for the plaintiff's attorney (who objectively should advise his client to accept the settlement as being in the client's best interest)

Marek v. Chesny (US Sp. Ct. 1985) – Issue: may a plaintiff collect statutorily-authorized attorneys' fees when the ultimate damages awarded is less than the amount of a rejected pretrial settlement offer? Here \$100K settlement offer, but only \$60K damages awarded after a trial. \$171K attorneys' fees and expenses sought under § 1988, although \$140K of that was incurred post-offer. Ct. holds that post-offer attorneys fees may **not** be recovered. Relies on Fed. R. Civ. P. 68, which shifts "costs" to prevailing plaintiff for all post-offer costs incurred when amount of damages ultimately awarded are less than settlement offer. Ct. reads "costs" in language of Rule 68 to include "attorneys fees" under § 1988.

Stefan v. Laurenitis (1st Cir. 1989) (Note, Casebook, at p. 1318): Plaintiff who enters into a favorable settlement is a "prevailing party" under § 1988. Ct. reasons that settlement "changed the legal relationship" of the parties within the meaning of Texas States Teachers, *supra*.

* This is the clear majority rule in federal courts

Cooter & Gell v. Hartmax Corp. (US Sp. Ct. 1990): Fed. R. Civ. P. 11 issues – Rule 11 permits recovery of attorneys' fees as part of sanctions. Sp. Ct.'s holdings: (1) Filing of voluntary dismissal of lawsuit by plaintiff does not foreclose attorneys' fees as sanction of plaintiff or his attorney under Rule 11; (2) abuse-of-discretion standard of review applies on appeal to all Rule 11/sanctions issues; and (3) Rule 11 does not permit award of attorneys' fees for work by non-sanctioned party's attorney *on appeal*; limited to attorney work in district court.

* Language of Rule 11 – signature of party or party's attorney

Pavelic & LeFlore v. Marvel Entertainment Group (US Sp. Ct. 1989) (Note 1, Casebook, at p. 1329): Rule 11 applies to individual lawyer/signer only – **not** to law firm of which the attorney was a member

Business Guides, Inc. v. Chromatic Communc. Enterpr. (US Sp. Ct. 1991) (Note 2): Rule 11 **does** apply to a corporate entity of which the party/signer is a signatory officer/agent

PREJUDGMENT INTEREST:

- * traditional rule was that only damages that were readily ascertainable prior to judgment (“liquidated”) were subject to prejudgment interest award

- * Increasingly governed by statute or court rule (rather than by traditional equitable considerations) – see, e.g., Texas Finance Code § 304.102 *et seq.* (superseding Cavnar, *infra*)

- * Prejudgment vs. Post-judgment Interest

General Motors Corp. v. Devex Corp (US Sp. Ct. 1983) – Issue: what is proper standard for awarding prejudgment interest in a patent infringement case? Trial awarded successful plaintiff \$9 million in actual damages (royalties due to P) and \$11 million in prejudgment interest. Ct. rejects old common law “liquidated” damages rule for awarding PJI. Ct. holds that, ordinarily, PJI should be awarded from date of defendant’s liability. Only fair thing to do in making plaintiff “whole.”

Cavnar v. Quality Control Parking, Inc. (Tex. 1985) – read only for academic purposes – no longer the law in Texas → significant for its discussion of modern trend toward prejudgment interest-*qua*-compensatory damages in all types of cases (versus PJI interest as “interest” or as a penalty); rationale: makes P truly “whole” – **opportunity cost rationale**. Abolished, once and for all, the distinction between liquidated and unliquidated damages

- * Cavnar and Tex. Civ. Stat. art. 5069-1.05(6) have been overruled/superseded by statute and by caselaw in a number of respects. See Robert Pemberton, *A Guide to Recent Changes and New Challenges in Texas Prejudgment Interest Law*, 30 Tex. Tech L. Rev. 71 (1999)

- * simple interest vs. periodically compounded (e.g., daily) interest

- * statutory rate of interest (e.g., 6%)

- * “timing” issues regarding prejudgment interest (e.g., 6 months from date of date in wrongful death/survivor action)

- * effect of pretrial settlement offer on interest accrual

Crown Central Petro. Corp. v. Nat’l Union Fire Ins. (5th Cir. 1985): notes that Texas Supreme Court’s intent in Cavnar was to provide for prejudgment interest in **all** types of civil actions for money damages in Texas

Bullis v. Security Pacific Nat’l Bank (Cal. 1978): California Supreme Court’s extension of prejudgment interest to negligence tort against a bank for breaching duty of reasonable care in permitting withdrawals – PJI awarded from date of accrual of liability (not from date of filing lawsuit) – Makes P “whole.”

Tripp v. Swoap (Cal. 1976): Ct. approves PJI on damages for wrongful denial of welfare benefits – Ct. notes traditional rule that PJI not awarded against gov’tal defendant; however, here a statute provided for it, so common law rule inapplicable.

* END OF COURSE *